Supreme Court, U.S.
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No. 09-091035

In The

Supreme Court of the United States

IMAD SALIM HEREIMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the intent or knowledge element of a criminal offense can be proven based on a high probability that a criminal defendant was deliberately ignorant, or whether the facts giving rise to a finding of deliberate ignorance must be proven beyond a reasonable doubt?

2. Whether the standard for admission of prior bad acts evidence under Fed.R.Evid. 404(b) applies when a defendant seeks to admit the evidence against an alleged co-conspirator and the evidence is relevant to one or more of his defenses?

PARTIES

All parties are named in the case caption.

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OPINIONS AND ORDERS BELOW

Petitioner was tried in the United States District Court for the District of Alaska and the jury verdict was entered on August 29, 2008. (App. 65-71). The criminal judgment was filed on December 2, 2008 and a timely appeal was taken to the Court of Appeals for the Ninth Circuit. (App. 1-3). The Court of Appeals for the Ninth Circuit issued its unpublished opinion on November 23, 2009. (App. 1-2).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its unpublished opinion on November 23, 2009. (App. 1-2). Petitioner did not seek rehearing and this Court has jurisdiction to review a final decision from the United States Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341
Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346
Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

This is a criminal case arising from the Federal District Court for the District of Alaska, at Anchorage. Petitioner was indicted along with Nezar "Mike" Maad on January 16, 2008. (App. 16-22). Petitioner was charged with aiding and abetting Maad's Honest Services Mail Fraud in violation of 18 U.S.C. § 1341 as defined by 18 U.S.C. § 1346. Petitioner was the only defendant that was actually brought to trial because Maad fled the country prior to prosecution. (App. 32) (ER 30-31).

Prior to trial, the Government filed a motion in limine seeking to introduce Evidence Rule 404(b) evidence. (ER 8-15).[1] Petitioner did not oppose the Government's motion. (ER 25-26). Petitioner also sought to introduce Evidence Rule 404(b) evidence. (App. 23-36). Petitioner sought to prove that Maad was a skilled con-man and that Petitioner had been

[1] Citations to the record as "ER" refer to the Excerpt of Record filed in the Court of Appeals and "CR" refer to the Clerk's Record.

another victim of Maad's deception. *Id.* The District Court held that some of the evidence Petitioner sought to introduce would be appropriate, but bad acts evidence would be inadmissible as evidence of propensity. (App. 46-47).

Jury trial began on August 18, 2008. (ER 95, CR 66). The trial continued for 10 days. (ER 95-97, CR 77). Petitioner objected to two jury instructions proffered by the Government and approved by the District Court. (App. 49-53, 54-64). Specifically, Petitioner objected to Instruction Nos. 3 and 6. *Id.* The District Court overruled those objections. (App. 56-64). Petitioner's objection to these instructions was that Instruction No. 6, when read with Instruction No. 3, effectively removed the knowing or intent element of the offense of aiding and abetting Honest Services Mail Fraud and lessened the burden of proof required for a conviction. (App. 54-64).

The jury returned guilty verdicts against Petitioner on August 29, 2008. (App. 65-71). Petitioner made a motion for judgment of acquittal, which motion was denied on September 10, 2008. (ER 77-78). Petitioner was sentenced on November 24, 2008. (App. 4-13). The sentence included 5 years probation on each count, to run concurrently and restitution in the amount of $13,291.19, as well as a fine in the amount of $13,291.19. *Id.*

STATEMENT OF RELEVANT FACTS

Petitioner is a naturalized citizen of the United States who was born in Kuwait and immigrated to the United States in 1978. (ER 27). From 1986 to the present, Petitioner has owned and operated a Golden Donuts business in Alaska. (ER 28).

Nezar Khaled "Mike" Maad is an Arab-American who once owned a print shop in Anchorage, Alaska. On September 22, 2001, less than two weeks after the tragic 9/11 attacks on the World Trade Center and the Pentagon, Maad's print shop suffered extensive vandalism damage to its equipment and was defaced by the words "We hate Arabs." *See United States v. Maad*, 75 Fed. Appx. 599 (9th Cir. Alaska 2003) (unpublished).

Petitioner first met Maad in 2004, when he hired Maad to complete some remodeling work on his home. (ER 27). They became friends, and although Petitioner was aware of Maad's prior brushes with the law, he was led to believe, by Maad, that Maad had been the subject of post 9/11 discrimination because he was an Arab. (ER 27-28).

In 2005, Maad suggested that Petitioner was working too hard in the donut business and they talked about various other business ventures that would be less physically demanding. (ER 28-29). Maad suggested that they could go into a print brokerage business together. (ER 28-29).

A print brokerage helps other businesses obtain the printing products and services they need, without actually providing the printing themselves. Petitioner had no knowledge of the printing business, but he knew that Maad had experience because he had previously owned a printing business in Anchorage. (ER 28-30). On the advice and with assurances from Maad, Petitioner set up a company named Horizon Graphics. (ER 29).

Maad was employed with the State of Alaska, Department of Health and Social Services. (ER 18). He was employed as a publications specialist and as part of his duties he procured printing services for the State. *Id.* He did not tell Petitioner that was part of his job duty; rather, he described his State job as being a graphics artist. (ER 29).

In March 2006, the Alaska State Troopers began an investigation into Maad's involvement with Horizon Graphics. (ER 19, 29). During this investigation it was discovered that Maad was arranging for print jobs and then selling those jobs to the State. (ER 24). Although a thorough investigation was undertaken by the State and the Federal Bureau of Investigation, no evidence of overt acts on the part of Petitioner were ever discovered. *Id.* Petitioner did not believe what he was doing was wrong, and he had no knowledge of the fact that Maad was violating State ethics laws. (ER 30). In fact, Petitioner had no knowledge of State ethics laws, was not employed by the State of Alaska and had not gone through any State ethics orientation program. Petitioner claimed

that Maad used him to implement a scheme to defraud the State of Alaska and Petitioner was a victim of Maad's deception. (ER 3-7) (App. 23-36).

BRIEF SUMMARY OF EVIDENCE PRESENTED AT TRIAL

Evidence began with the testimony of a local print shop owner that had become concerned with Maad ordering print jobs from him and having those jobs delivered to Horizon Graphics. (Tr. Vol. III, 29-104). This testimony indicated Maad's involvement, not petitioner's. *Id.*

Next, the Government presented the testimony of a Federal Probation Officer. (Tr. Vol. III, 105). Again, this evidence centered on Maad, his prior bad acts, and the reason that he was on Federal Probation for prior crimes. (Tr. Vol. III, 105-126). The testimony also involved the reasons for a search of Maad's residence, and the results of that search. *Id.* Notably, Maad was not available because he had fled the country while on bail. (ER 30-31).

A Special Agent for the Federal Bureau of Investigation also testified at trial. (Tr. Vol. III, 126-162). He testified as to his involvement in searches, the results of those searches and the evidence obtained. *Id.* The primary subject of this testimony was Maad's conduct, and not Petitioner' intent or

knowledge, with regard to Maad's duty to disclose a conflict or Maad's failure to disclose that conflict. *Id.*

An accounting supervisor with the State of Alaska testified as to the State of Alaska's accounting procedures and requirements for issuance of treasury warrants to pay for services. (Tr. Vol. IV, 14-62). While this testimony laid the foundation for admission of the treasury warrants paid to Horizon Graphics, it provided no evidence whatsoever as to Petitioner's intent or knowledge. *Id.*

An Officer from the Anchorage Police Department testified during trial. (Tr. Vol. IV, 78-111). His testimony centered around a request to assist in a probation search of Maad's residence. *Id.* He testified as to the extent of the search, the results of the search, and offered no evidence to support the conclusion that Petitioner acted with intent or knowledge. *Id.* The next witness' testimony was similar in that it involved the execution of search warrants. (Tr. Vol. IV, 118-134).

The Public Information Manager for the State of Alaska, Department of Health and Social Services testified regarding the State's procurement practices, and Maad's employment. (Tr. Vol. IV, 142-207). He testified that Maad did not report his involvement with Horizon Graphics and what would likely have been done by the State had that involvement been reported. *Id.* He did, however, testify that Maad had disclosed that he was "self-employed" and that he

provided general graphic design and consulting to local businesses. (Tr. Vol. IV, 159-160).

The Government relied heavily on the testimony of Sergeant DeGraaf of the Alaska State Troopers. (Tr. Vol. V, at 8). Sergeant DeGraaf testified as to the report from another printer, and how he began the investigation into Maad's activities. (Tr. Vol. V, 8-13). Sergeant DeGraaf also testified extensively about Maad's involvement, but had little to offer regarding Petitioner's involvement. (Tr. Vol. V, 8-80). On cross, he testified that he saw no reason to believe that the State of Alaska paid for something they did not receive, or that the State complained about the quality of the services rendered. (Tr. Vol. VI, at 39). He also recognized that Maad had filed a bid protest with the State of Alaska, and had used his name on correspondence with the State. (Tr. Vol. VI, at 45). In that correspondence, Maad referred to himself as some sort of manager with Horizon Graphics. *Id.* He had no information that would lead him to believe that Petitioner tried to hide Maad's involvement with Horizon Graphics. (Tr. Vol. VI, at 47). Although Sergeant DeGraaf was the primary investigator, he had no information about Petitioner's knowledge or intent with regard to conflict of interest rules and a failure to report a conflict of interest, or Maad's duty to so report. (Tr. Vol. VI, 50-52). The Government rested after the testimony of Sergeant DeGraaf. (Tr. Vol. VI, at 75).

Petitioner testified in his defense. (Tr. Vol. VI, at 95). He testified that he first met Maad in the

summer of 2004. (Tr. Vol. VI, at 107). Maad was experienced with home remodeling and Petitioner was having some problems with a marble floor in his home. (Tr. Vol. VI, 108-113). Maad was hired to help fix that floor and to do other work in the Petitioner's home. *Id.* Over a period of time, Petitioner and Maad became friends. *Id.* Petitioner had heard gossip about Maad's past brushes with the law, but Maad had what Petitioner believed were reasonable explanations for the past problems, like being associated with tragedy on 9/11 and his being of Middle Eastern decent. (Tr. Vol. VI, 115-117). Eventually, their conversations turned to the printing business. Maad had considerable experience in printing because he had previously owned his own print shop and he had previously contracted with the State of Alaska. (Tr. Vol. VI, 118-119).

Maad suggested a print broker business where the broker arranged for the printing at wholesale prices and resold them at retail prices. (Tr. Vol. VI, 127-128). Petitioner expressed his concern that he had no experience with the printing business and Maad offered to help him get into it and learn the business. *Id.* When he started Horizon Graphics, Petitioner knew that Maad worked for the State of Alaska and he inquired as to whether Maad would get into any trouble if he helped Petitioner get started in the print broker business. *Id.*, at 135-136. Maad assured him that there was no problem because he was not being paid and he was just helping a friend get into the business. *Id.* Petitioner believed he could

trust Maad because if he was really dishonest and essentially a criminal, he did not believe the State Government would have hired Maad and put him in a position of trust. *Id.*, at 137. Petitioner testified that the business belonged to him, and although Maad had signatory authority, he was never paid any money and he was only helping Petitioner get started in the business. (Tr. Vol. VI, 158-162).

In his defense, Petitioner presented the testimony of Maad's ex-wife, who testified that Maad was a very dishonest individual and could not be trusted. (Tr. Vol. VII, 119-120). When she started to give her basis for her opinion as to Maad's reputation, the Court sustained an objection that specific acts evidence were not admissible. *Id.*

Maad's daughter likewise testified for the defense. (Tr. Vol. VII, at 123). Maad's daughter also stated that her father's reputation was not good and when she started to explain why, the Court sustained the Government's objection as to specific acts. *Id.*, at 123-125. She did, however, testify that her father had a history of gaining people's trust and then deceiving them. *Id.*, at 126.

REASONS FOR GRANTING THE WRIT

At stake in this case are constitutional protections of national importance. Those protections include the right of a criminal defendant to defend the charges brought against him, *Crane v. Kentucky*,

476 U.S. 683, 690 (1986), and the right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *See United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). *In re Winship*, 397 U.S. 358, 364 (1970). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. Moreover, a bedrock tenet of our criminal justice system is a defendant's right to defend the charges brought against him. *Crane*, 476 U.S. at 690.

Under these fundamental principles, governing proof beyond a reasonable doubt, and the right of a criminal defendant to defend the charges against him, it follows that when deliberate ignorance is substituted for the intent or knowledge element of an offense, the facts giving rise to deliberate ignorance must be proven beyond a reasonable doubt. (App. 49-53). It also follows that a criminal defendant should not be prohibited from introducing prior acts evidence against a co-conspirator, when his defense is that he was "duped" by that co-conspirator. (App. 23-36).

There currently exists a conflict between several Circuit Courts of Appeal on the appropriate instruction to be given when deliberate ignorance is asserted by the prosecution. There also exists a conflict between several Circuit Courts of Appeal on the question whether and to what extent Fed.R.Evid. Rule 404(b) applies when a criminal defendant seeks to admit bad acts evidence as part of his defense. Review by this Court is warranted under this Court's Rule 10(a) and (c) because the questions raised are of national import, there is a conflict between the circuits on issues not previously resolved by this Court, and an individual injustice has occurred because Petitioner has been denied the right to a complete defense and convicted on facts established by high probability instead of proof beyond a reasonable doubt.

I. CONFLICT EXISTS REGARDING THE APPROPRIATE LANGUAGE OF A DELIBERATE IGNORANCE INSTRUCTION TO BE GIVEN TO A JURY.

Deliberate ignorance as a definition of knowledge apparently began with this Court's 1969 decision in *Leary v. United States*, 395 U.S. 6 (1969). In *Leary* the defendant had been charged with knowingly transporting illegally imported marijuana with knowledge of its illegal importation, and the Court "employed as a general guide" the Model Penal Code definition of knowledge. *Leary*, 395 U.S. at 46 n.93. The Court found that, even using the Model Penal Code

definition, it could not be said that a majority of marijuana smokers were aware that a high probability existed that their marijuana had been imported. 395 U.S. at 47-53. Thus, the presumption was held unconstitutional with respect to marijuana. *Id.*

Nearly a year later, in *Turner v. United States*, 396 U.S. 398 (1970), the Court reiterated this definition in the deliberate ignorance context, citing the Model Penal Code and holding that "those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." *Turner*, 396 U.S. at 417 (footnotes omitted). Thus, the Court confirmed that actual knowledge is not necessary, although it offered no explanation beyond citation to the Model Penal Code. *Id.* at 416 n.29. It does not appear whether this Court has yet decided on the appropriate language of a deliberate ignorance instruction and or considered whether the facts giving rise to deliberate ignorance must be proven beyond a reasonable doubt.

Although *Leary* and *Turner* did not involve a jury instruction, in their wake deliberate ignorance instructions appeared with increasing frequency in federal prosecutions. *See, e.g.*, *United States v. Aleman*, 728 F.2d 492, 494 (11th Cir. 1984) (importation and possession of cocaine with intent to distribute); *United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983) (same); *United States v. Nicholson*, 677 F.2d 706, 710-11 (9th Cir. 1982) (conspiracy to import and possess marijuana with intent to distribute); *United*

States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (importation of heroin); *United States v. Restrepo-Granda*, 575 F.2d 524, 528-29 (5th Cir.) (importation and possession of cocaine with intent to distribute), *cert. denied*, 439 U.S. 935 (1978); *United States v. Moser*, 509 F.2d 1089, 1092-93 (7th Cir. 1975) (possession with intent to distribute lysergic acid diethylamide (LSD)); *United States v. Dozier*, 522 F.2d 224, 226-27 (2d Cir.) (aiding and abetting the possession of cocaine with intent to distribute), *cert. denied*, 423 U.S. 1021 (1975); *United States v. Joly*, 493 F.2d 672, 675-77 (2d Cir. 1974) (importation of cocaine, possession of cocaine not entered in the manifest on board an aircraft, and possession with intent to distribute); *and see United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir.) (holding that, in prosecution for falsely stating in an alien's tax return that the alien did not intend to return to the United States, an accountant need only have acted with reckless disregard of whether the statement was true or with a conscious purpose to avoid learning the truth), *cert. denied*, 404 U.S. 994 (1971). There is conflict however in the wording of an appropriate deliberate ignorance instruction: on whether a motive element should be included in the instruction and there is no clear guidance on whether facts giving rise to deliberate ignorance should be proven beyond a reasonable doubt.

For an example of the conflict, this Court need look no further than two decisions from the Court of Appeals for the Ninth Circuit and the jury instruction

given in this case. (App. 53); *see United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976); *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 1077 (2007). Each of these decisions provide a comprehensive discussion of rise and evolution of the deliberate ignorance of willful blindness instruction given in Petitioner's case. In *Jewell* the instruction required proof beyond a reasonable doubt and included a motive element. *Jewell*, 532 F.2d at 900. In *Heredia*, the decision applied in Petitioner's case (App. 1-2), the Ninth Circuit eliminated the motive element and approved an instruction with conflicting language as to the burden of proof. *Heredia*, 483 F.3d at 917, 920. The instruction given in Petitioner's case contained no motive element, and it confused the jury by allowing the jury to decide facts based on a high probability, rather than proof beyond a reasonable doubt. (App. 53). The confusion from the jury instruction arises from the confusing body of authority authorizing and framing the deliberate indifference instruction and injustice is the result. This Court should review the first question presented by Petitioner to resolve the validity of a deliberate ignorance instruction, its proper wording, whether it should include a motive element, and whether it should clearly state that all facts giving rise to deliberate ignorance should be decided by proof beyond a reasonable doubt.

II. CONFLICT EXISTS WHETHER THE STANDARD APPLIED TO ADMISSION OF EVIDENCE UNDER FED.R.EVID. 404(b) SHOULD ALSO APPLY TO EVIDENCE PROFFERED BY A DEFENDANT AS PART OF HIS DEFENSE.

Federal Rules of Evidence 404(b) protects the concept that a defendant must be tried only for the charged offense, not for past crimes, wrongs, acts, or for who he is as a person. *McCormick on Evidence* § 190 (Edward W. Cleary ed., 3d ed. 1984). The rule allows admission of a defendant's other bad acts only for certain limited purposes, including proving the defendant's intent, motive, identity, and plan, and courts must protect the defendant against unfair prejudice using the procedure outlined in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988).

Huddleston applies when the prosecution seeks to admit other bad acts evidence against the accused, but does the Rule also apply when a defendant wants to offer evidence of a third party's other bad acts in order to prove that the third party committed the crime or tricked the defendant into aiding and abetting the commission of a crime? Reliance on the right to provide a complete defense, and other important constitutional principles suggests that the defendant has the constitutional right to introduce this evidence whenever it would raise some reasonable doubt as to guilt. The question then is whether courts disregard Fed.R.Evid. 404(b) when a defendant seeks to offer "other bad acts" into

evidence, in order to provide the defendant with a meaningful opportunity to present a complete defense? Or, should courts hold defendants to the same standard for admission to which prosecutors are subject when offering evidence against defendants?

Generally, defendants seek to apply the other acts rule to third parties for a variety of reasons. The defendant may want to prove that some other person committed the crime with which the defendant is charged. Therefore, the defendant offers evidence that some other person committed crimes similar to the one with which the defendant is charged, raising at least a possibility that this other person actually committed the crime with which the defendant has been charged. As in Petitioner's case, a defendant may want to prove that a third party coerced or duped him into committing the crime. To prove this defense, the defendant offers evidence that the third party coerced or duped others on different occasions, raising an inference that the person coerced or duped the defendant as well. Essentially, the defendant wants to offer evidence of a third party's other bad acts in support of his defense and there is a conflict between the Circuits as to the standard to be applied when a defendant seeks to introduce other bad acts evidence against a third party or an alleged co-conspirator. *See, e.g., United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977); *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir.

1984); and *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir. 1991).

In *Stevens*, the Third Circuit concluded that the district court imposed too stringent a standard of similarity on Stevens, and that the government had unnecessarily compartmentalized the permissible uses of defendant's use of 404(b) evidence. The Court found it well established that a defendant may use similar other crimes' evidence defensively if it tends, alone or with other evidence, to negate his guilt of the crime charged against him. The Court agreed with other jurisdictions that a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor. The Court concluded that a defendant may introduce reverse 404(b) evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations. *Id.*, at 1404. While the court in *Stevens* includes 404(b) in the name it gives the kind of evidence it describes, the formulation of the standard it applied leaves out any requirement of identifying a proper purpose for the admission of that evidence. *United States v. Stevens*, 935 F.2d at 1405. Arguably then, evidence of a third party's other bad acts could be introduced to prove propensity alone under the Third Circuit's standard for admission. This assumption is supported by the court's decision to "reject the government's attempt to impose hard and fast preconditions on the admission of 'reverse 404(b)' evidence." *Id.*

In *United States v. McClure*, the Fifth Circuit reversed an exclusion order entered by the district court. In doing so, the Court held that under Rule 404(b), "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced." *Id.* at 672-73.

In *United States v. Aboumoussallem*, the defendant wanted to introduce Rule 404(b) evidence to corroborate his defense that he was unwittingly "duped" into transporting contraband by his co-conspirator cousins. 726 F.2d at 911. The defendant offered to prove that five and a half months prior to his arrest his cousins similarly duped Wendy Golding into transporting hashish oil from Lebanon into the United States. *Id.* The Second Circuit concluded that a less restrictive standard should be applied when considering the admission of reverse 404(b) evidence, as opposed to when the Government attempts to use 404(b) evidence against an accused. *Id.*

The Ninth Circuit has taken a different view on whether 404(b) applies when other acts evidence is offered against third parties. In *United States v. McCourt*, the Ninth Circuit did not specifically resolve the question whether a less restrictive approach should apply when reverse 404(b) evidence is offered by an accused. *Id.* However, the Ninth Circuit essentially applied the same standard to a defendant's use of 404(b) evidence as it would apply to the prosecution's use of that evidence against the defendant. *Id.*

In Petitioner's case, the Ninth Circuit avoided this issue by noting that the District Court applied 404(b), but determined that the probative value of the evidence was substantially outweighed by unfair prejudice. (App. 2). That, however, is not completely accurate as the District Court clearly stated the proffered evidence tended to prove propensity, which is precluded by 404(b). (App. 46-47). Moreover, the District Court's, and the Ninth Circuit's, conclusion that the probative value was outweighed by unfair prejudice raises the question: Who was being prejudiced? It is certain that the accused is not prejudiced by the admission of relevant, 404(b) evidence against a third party or co-conspirator, when that evidence is admitted by the accused for purposes of proving a valid defense.

Because there is conflict regarding the interpretation and application of 404(b) when the evidence is sought to be admitted by the defendant, and because resolution of the question is relevant to a defendant's fundamental due process right to a complete defense, review of this question is warranted under this Court's Rule 10.

CONCLUSION

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that the Sixth Amendment right to a

jury trial prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt. This core, constitutional protection should also apply to facts established to prove deliberate ignorance when deliberate ignorance is asserted by the prosecution as an element of the offense and as an alternative to the requisite intent or knowledge. Important constitutional rights are at stake when the prosecution is allowed to reduce intent of knowledge element to a high probability that a defendant had knowledge of an important fact, and there is a conflict in the Circuits as to when a jury instruction on deliberate ignorance may be used and how it should be worded so as to avoid constitutional infirmity.

This Court may grant review when constitutional rights are at issue, and the Circuit Courts are divided over a question unresolved by past decisions from this Court. The right of a defendant to present an adequate defense and proffer evidence in support of that defense implicates important constitutional protections that should be jealously guarded. The unresolved question is whether Fed.R.Evid. 404(b) should be applied to deny admission of that evidence when the evidence is offered by the defendant against a third party or co-conspirator.

Based on the above, it is respectfully requested that the Petition be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IMAD SALIM HEREIMI, Defendant-Appellant.	No. 08-30468 D.C. No. 3:08-CR-00007-JKS **MEMORANDUM***

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Senior District Judge, Presiding

Argued and Submitted November 3, 2009
Seattle, Washington

(Filed Nov. 23, 2009)

Before: FERNANDEZ, KLEINFELD, and CLIFTON, Circuit Judges.

Imad Salim Hereimi appeals his conviction for aiding and abetting deprivation of honest services mail fraud. *See* 18 U.S.C. §§ 1341, 1346. We affirm.

(1) Hereimi first claims that the district court erred when it excluded certain prior bad evidence regarding Nezar Maad, the person whom Hereimi

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

was charged with aiding and abetting. We disagree. The district court rather thought that the bad acts were too remote in time and too dissimilar to be properly admissible pursuant to Federal Rule of Evidence 404(b). *See United States v. Banks,* 514 F.3d 959, 976 (9th Cir. 2008); *United States v. Lynch,* 437 F.3d 902, 915 (9th Cir. 2006) (en banc). In any event, the district court determined that the probative value of the evidence in question was substantially outweighed by its tendency towards unfair prejudice and confusion of the issues. That, it ruled, warranted exclusion of the evidence pursuant to Federal Rule of Evidence 403. On this record we cannot say that the district court abused its discretion in so ruling. *United States v. 87.98 Acres of Land More or Less in the County of Merced,* 530 F.3d 899, 907 (9th Cir. 2008); *Duran v. City of Maywood,* 221 F.3d 1127, 1133 (9th Cir. 2000).

(2) Hereimi also claims that the district court erred when it gave a deliberate indifference instruction to the jury, but his disagreement is with the propriety of deliberate indifference instructions in general. His claim is foreclosed. *See United States v. Heredia,* 483 F.3d 913, 924 (9th Cir. 2007) (en banc). So, too, is his suggestion that, even when supported by the evidence, the instruction must be avoided in some cases – this being one of them. *See id.* at 922-24; *United States v. Henderson,* 721 F.2d 276, 278-79 (9th Cir. 1983). The district court did not err.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IMAD SALIM HEREIMI, Defendant-Appellant.	No. 08-30468 D.C. No. 3:08-cr-00007-JKS U.S. District Court for Alaska, Anchorage **MANDATE** (Filed Dec. 15, 2009)

The judgment of this Court, entered November 23, 2009, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

Gabriela Van Allen
Deputy Clerk

UNITED STATES DISTRICT COURT

_____ District of Alaska

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 3:08-cr-00007-02-JKS
IMAD SALIM HEREIMI	USM Number: 15632-006
	THEODORE STEPOVICH Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:1341, 1346	HONEST SERVICES FRAUD BY MAIL	4/26/2006	1-2, 4-7, & 9-22

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) 3 and 8 ☐ is X are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

NOVEMBER 24, 2008
Date of Imposition of Judgment

REDACTED SIGNATURE
Signature of Judge

JAMES K. SINGLETON,
U.S. DISTRICT JUDGE
Name and Title of Judge

12/1/08
Date

PROBATION

The defendant is hereby sentenced to probation for a term of:

5 years as to each of Counts 1, 2, 4-7, and 9-22; terms to run concurrently.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of a DNA sample from the defendant as directed by

the Bureau of Prisons prior to release or by the probation officer upon release.

2. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a federal probation or pretrial services officer or other law enforcement officer, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation.

3. The defendant shall provide the probation officer access to any requested financial information, including authorization to conduct credit checks, and shall not incur any new debts or apply for credit without the prior approval of the probation officer.

4. The defendant shall not possess a firearm, destructive device, or other weapon.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 2,000.00	$ 13,219.91	$ 13,219.91

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
STATE OF ALASKA, Dept of Health and Social Social [sic] Services	$13,219.91	$13,219.91	100%
TOTALS	$ 13219.91	$ 13219.91	

☐ Restitution amount ordered pursuant to plea agreement $ _____

X The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 28,439.82 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, or ☐ E, or
☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Any unpaid amount of the restitution, fine, and special assessment is to be paid during the period of Probation in monthly installments of not less than 10% of the defendant's gross monthly income or $25, whichever amount is greater. Interest on the obligation(s) shall not be waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Nezar Khaled "Mike" Maad 3:08-cr-00007-01-JKS $26,439.82 Joint & Several: $26,439.82 State of AK, Dept of Health and Social Services

Imad Salim Hereimi 3:08-cr-00007-02-JKS $26,439.82 Joint & Several: $26,439.82 State of AK, Dept of Health and Social Services

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused – Evidence In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim – Evidence In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness – Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

NELSON P. COHEN
United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. NEZAR KHALED "MIKE" MAAD, and IMAD SALIM HEREIMI, Defendants.	No. COUNTS 1-22: HONEST SERVICES FRAUD BY MAIL Vio. 18 U.S.C. §§ 1341, 1346

INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times material to this Indictment:

1. NEZAR KHALED "MIKE" MAAD ("MAAD") was employed by the State of Alaska as a Publication

Specialist II for Financial & Management Services, a branch of the Department of Health and Social Services ("DHSS") between January 27, 2003 and May 26, 2006. MAAD's duties included writing, planning, and designing publications, brochures, forms, business cards, and other printed material for publication and use by the DHSS.

2. Horizon Graphics was a licensed printing company, P.O. Box 244611, Anchorage, AK 99524-4611, owned by IMAD SALIM HEREIMI ("HEREIMI"); Horizon Graphics had no printing equipment and was operated out of Golden Donuts, 2213 East Tudor Road, Anchorage, Alaska, a business owned and operated by HEREIMI.

RELEVANT ALASKA STATE LAW

3. An Alaska state public officer may not use, or attempt to use, an official position for personal gain. A.S. §39.52.120(a). An Alaska state public officer may not accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state. A.S. §39.52.120(b)(2). An Alaska state public employee may not render services to benefit a personal or financial interest or engage in or accept employment outside the agency which the employee services, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties. A.S.§39.52.170(a).

4. State of Alaska Treasury Warrants are issued in payment for invoices submitted to the State of Alaska.

THE SCHEME

5. Beginning in and around October, 2005, and continuing thereafter until at least in or about April, 2006, the defendants, NEZAR KHALED "MIKE" MAAD, and IMAD SALIM HEREIMI, devised and intended to devise a material scheme and artifice to defraud the State of Alaska and the citizens of the State of Alaska of public funds and of their right to the honest services of MAAD, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, concealment and conflict of interest.

PURPOSE OF THE SCHEME

6. The purpose of the scheme was for MAAD to use his position as a state employee to obtain money for Horizon Graphics from State of Alaska printing jobs in order to provide funds to establish a construction company called Horizon Construction to be owned and operated by MAAD and HEREIMI.

MANNER AND MEANS

7. The manner and means by which MAAD and HEREIMI carried out the scheme included MAAD using his position as a State of Alaska employee to

obtain print job requests needed by the State of Alaska;

8. It was further part of the scheme that HEREIMI obtained an Alaska Business License for Horizon Graphics;

9. It was further part of the scheme that HEREIMI, as owner of Horizon Graphics, established a business account for Horizon Graphics with Wells Fargo Bank N.A. and obtained two Wells Fargo Visa credit cards, XXXX-XXXX-XXXX-7880 and XXXX-XXXX-XXXX-7301 for use by Horizon Graphics;

10. It was further part of the scheme that MAAD would arrange for the State of Alaska printing orders to be completed at printing companies other than Horizon Graphics for set prices, without disclosing his relationship with the State of Alaska;

11. It was further part of the scheme that MAAD would then pay the other printing companies for the finalized printing orders with cash or using the Wells Fargo Visa credit cards, XXXX-XXXX-XXXX-7880 and XXXX-XXXX-XXXX-7301 previously obtained by HEREIMI for Horizon Graphics;

12. It was further part of the scheme that the defendants in the name of Horizon Graphics would then create or cause to be created new invoices to the State of Alaska for those completed orders, inflating the prices, but adding no value to the projects;

13. It was further part of the scheme that the new inflated Horizon Graphics invoices would then be

submitted by MAAD for payment by the State of Alaska;

14. It was further part of the scheme that the payments from the State of Alaska, based upon the inflated invoices submitted by MAAD, would then be mailed to HEREIMI and deposited into the Horizon Graphics bank account with Wells Fargo Bank, N.A.

COUNTS 1-22

15. Paragraphs 1-14 of this Indictment are hereby realleged in their entirety and incorporated by reference herein.

16. On or about the dates set forth below, in the District of Alaska, the defendants, NEZAR KHALED "MIKE" MAAD and IMAD SALIM HEREIMI, for the purpose of executing and attempting to execute the above described material scheme and artifice to defraud, did knowingly cause to be placed in an authorized depository for mail matter, to be sent and delivered by the Postal Service according to the directions thereon, and to take and receive therefrom the foregoing mail matter, to wit: STATE OF ALASKA TREASURY WARRANTS to IMAD HEREIMI dba Horizon Graphics, P.O. Box 244611, Anchorage, AK 99524-4611, with each mailing constituting a separate and distinct count:

COUNT	DATE MAILED	WARRANT NUMBER	AMOUNT	HORIZON GRAPHICS INVOICE	ACTUAL COST
1	11/04/2005	21885003	$ 672.00	100220	$185.00
2	12/05/2005	21916738	$1660.00	100221	$716.66
3	12/05/2005	21916738	$ 470.00	100225	$171.45
4	12/21/2005	21938684	$4077.50	100235	$2374.75
5	1/04/2006	21950004	$1300.00	100245	$670.54
6	1/20/2006	21969232	$1159.00	100255	$349.93
7	1/25/2006	21973429	$ 104.00	100249	$ 40.00
8	1/25/2006	21973391	$ 192.00	100252	$ 92.00
9	1/26/2006	21975176	$ 156.00	100254	$ 80.00
10	2/07/2006	21989163	$1660.00	100253	$716.66
11	2/28/2006	22013707	$1675.00	100256	$1384.94
12	3/06/2006	22020099	$ 996.00	100264	$600.00
13	3/08/2006	22024292	$ 104.00	100263	$ 60.00
14	3/15/2006	22033048	$4825.00	100266	$240.00
15	3/16/2006	22034702	$ 342.00	100259	$ 60.00
16	3/28/2006	22045704	$ 890.00	100265	$576.35
17	04/11/2006	22061866	$ 385.00	100268	$185.00
18	04/14/2006	22067893	$ 104.00	100270	$ 40.00
19	04/25/2006	22079008	$ 268.00	100273	$ 65.00
20	04/26/2006	22081363	$ 52.00	100275	$ 20.00
21	05/05/2006	22093935	$ 968.00	100280	$253.75
22	05/16/2006	22105870	$1340.00	100279	$497.56

All in violation of Title 18, United States Code, Sections 1341 and 1346.

A TRUE BILL.

/s/ Grand Jury Foreperson
GRAND JURY FOREPERSON

/s/ Retta-Rae Randall
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DATED: January 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA Plaintiff, vs. IMAD SALIM HEREIMI Defendant	3:08-cr-00007-JWS-JDR

DEFENDANTS MEMORANDUM ON ADMISSION OF EVIDENCE RULE 404(b) EVIDENCE

Imad Hereimi ("Hereimi") is charged in Counts 1-22 of the indictment with honest services mail fraud in violation of Sections 1341 and 1346 of Title 18 of the United States Code. The United States has the burden of proving that Hereimi made up a scheme or plan to deprive the State of Alaska of its intangible right to honest services; that Hereimi acted with the intent to deprive the State of Alaska of its intangible right to honest services; and that Hereimi used, or caused someone to use, the mails to carry out or to attempt to carry out the scheme or plan. "Intent" is an essential element of the crimes charged in the indictment and Hereimi's state of mind or lack of criminal intent is an appropriate defense. *See United States v. Caruso*, 948 F. Supp. 382, 397 (D. N.J. 1996). Accordingly, any evidence that tends to prove Hereimi did not act with intent to

deprive the state of its right to honest services, is relevant evidence. *Id.*

Mike Maad ("Maad") was also charged and the Government alleges that Hereimi and Maad created a material scheme to defraud the State of Alaska by using Maad's position of employment with the State, a Publication Specialist II for Financial & Management Services, a branch of the Department of Health and Human Services ("DHHS"), for their personal and financial gain. The Government alleges that Hereimi acted in active concert with Maad.

In his defense, Hereimi alleges that he did not act with criminal intent; rather, he was befooled by Maad and that Maad has a history of involving taking in third parties for his own personal gain. As an example, in 1981 Vicki Gutierrez married Maad. Before their marriage, Vicki was dating Maad and became pregnant by him. At the time, Maad was working in a smoke cessation clinic in Kentucky owned by Vicki's father. Vicki left Alaska to visit her sister and Maad came to Alaska to join her. Within two days of his arrival Maad insisted they marry and took her down to the courthouse. Right after she married Maad she got a call from her father, who told her that Maad had embezzled money from the clinic. Her father was going to have the matter pursued criminally but Vicki convinced his not to do so. Maad then got a job at Harry's mens store. He became so close to the owner Harry, that Harry would refer to

him as brother.[1] One day Vicki got a call from Maad who said he was in London. She next got a call from Harry who said that Maad had been ripping him off by taking money and suits when discovered, he had cut and run. Vicki convinced Maad to come back, which he did and he made a deal with Harry to work for next to nothing until he paid what off what he stolen [sic]. This evidence tends to negate criminal intent on the part of Hereimi, because it shows that Maad ingratiates himself to others and uses them to further his criminal activities and that he cuts and runs when discovered, just like he has done in this particular case. Hereimi also intends to introduce evidence of his own good acts and traits, to demonstrate that he was taken in by Maad and led down a path that ended at the podium before the present jury.

The Government contends this evidence is inadmissible under Evidence Rule 404(b) and Hereimi contends that it is relevant and admissible to show he did not act with criminal intent. So the question to be answered here is whether a defendant may offer evidence of a third party's other bad acts and his own good acts in order to prove that the third party committed the crime or duped the defendant into assisting in the commission of the crime. If Hereimi was befooled by Maad, then Hereimi did not act with

---

[1] Similar conduct is alleged in this case. The Government alleges Hereimi and Maad were so close that Hereimi considered Maad to be a brother.

criminal intent and the Government will fail to prove one of the essential elements of the crimes charged, or, the jury could conclude that reasonable doubt exists as to whether Hereimi acted with criminal intent.

In considering whether this evidence is admissible, the Court is asked to also consider that "whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*quoting California v. Trombetta*, 467 U.S. 479, 485 (1984)) (citations omitted). Along with this standard is the fact that a defendant carries little or no burden in a criminal trial and the Government must prove every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). An appropriate defense strategy may be merely to raise some reasonable doubt as to the existence of one or more elements of the charged offense. *United States v. Stevens*, 935 F.2d 1380, 1406 (3d Cir. 1991) ("To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt."); *see also Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 204-05 (1982) (calling this strategy a "failure of proof defense" where the defendant presents evidence to negate an element of the offense). If a defendant has the constitutional right to an opportunity to present a

complete defense, then it follows that he has the constitutional right to an opportunity to offer evidence that some third party committed the crime or that he were duped by that third party, in order to raise a reasonable doubt in the jury's mind. *See Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (defendant is deprived of a fundamentally fair trial if evidence is suppressed that "if admitted would create reasonable doubt that did not exist without the evidence").

Evidence Rule 404(b) is a rule of inclusion, not exclusion and it traditionally comes into play when the Government tries to introduce other bad acts evidence against an accused. But, a basic tenet of criminal law is that a defendant must be tried only for the charged offense, not for past crimes, wrongs, acts, or for who he is as a person. *McCormick on Evidence* § 190 (Edward W. Cleary ed., 3d ed. 1984). The rule allows admission of a defendant's other bad acts only for certain limited purposes, including proving the defendant's intent, motive, identity, and plan, and courts must protect the defendant against unfair prejudice using the procedure outlined by the U.S. Supreme Court in *Huddleston v. United States*. 485 U.S. 681, 691-92 (1988). Rule 404 does not mention the "accused" or the "prosecution" until the second half of the rule; therefore, it seems to apply to evidence of anyone's other bad acts. *Fed. R. Evid.* 404(b). The first half of Rule 404(b) instead uses the words "a person."

Because Rule 404(b) is not limited to the accused or the prosecution, Courts have allowed 404(b) evidence to be admitted by the defendant and most Courts have applied a less restrictive analysis when considering whether a defendant may introduce 404(b) evidence related to third parties. Generally, defendants apply the other-acts rule to third parties (an application known as "reverse 404(b) evidence") in a couple of ways. First, the defendant may want to prove that some other person committed the crime with which the defendant is charged. Therefore, the defendant offers evidence that some other person committed crimes similar to the one with which the defendant is charged, raising at least a possibility that this other person actually committed the crime with which the defendant has been charged. Second, the defendant may want to prove that a third party coerced or duped him into committing the crime. To prove this defense, the defendant offers evidence that the third party coerced or duped others on different occasions, raising an inference that the person coerced or duped the defendant as well. Essentially, the defendant wants to offer evidence of a third party's other bad acts in support of his defense.

United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991), *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977) and *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984) show these uses of reverse 404(b) evidence. In *Stevens*, a man robbed and sexually assaulted two Air Force police officers at gunpoint. 935 F.2d at 1384-85. The two victims later

identified their attacker as *Stevens* from a wanted poster and at a lineup. *Id.*, at 1385. At trial, *Stevens* sought to introduce evidence that, three days after the police offers were assaulted, a man named Tyrone Mitchell was assaulted a few hundred yards away from the location of the previous assault. Although the crimes were so similar police originally thought the same person had committed both, Mitchell did not identify Stevens as his attacker. Stevens' defense theory was that the same person had most likely committed both crimes, and Mitchell's testimony proved the person was an unknown third party, not Stevens.

In reversing exclusion by the district court, the Fifth Circuit in *Stevens* concluded that the district court imposed too stringent a standard of similarity on Stevens, and that the government had unnecessarily compartmentalized the permissible uses of reverse 404(b) evidence. The Court found it well established that a defendant may use similar other crimes' evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him. The Court agreed with other jurisdictions that a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor. The Court concluded that a defendant may introduce reverse 404(b) evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations. *Id.*, at 1404.

In *United States v. McClure*, defendant McClure was charged with two counts of selling a controlled substance, arising from two incidents in which he sold heroin to an undercover agent from the Drug Enforcement Administration. 546 F.2d 670 (5th Cir. 1977). McClure's duress or coercion defense was that the DEA informant who arranged the sales had threatened and intimidated him into selling the drugs. *Id.*, at 672. To support his claim, McClure wanted to offer testimony from three people who claimed the informant had coerced them into selling heroin, including one witness who claimed the informant had shown him his gun and threatened to kill him if he did not produce the drugs in twenty-four hours. *Id.* McClure was arguing that if the DEA informant had coerced others into selling heroin, then it was likely McClure had been coerced as well. In reversing the exclusion order entered by the district court, the Court held that under Rule 404(b) "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced." *Id.* at 672-73.

In *United States v. Aboumoussallem,* the defendant wanted to introduce Rule 404(b) evidence to corroborate his defense that he was unwittingly "duped" into transporting contraband by his co-conspirator cousins. 726 F.2d at 911. The defendant offered to prove that five and a half months prior to his arrest his cousins similarly duped Wendy Golding into transporting hashish oil from Lebanon into the United

States. *Id.* Golding had been arrested on March 1, 1981, after a Customs examination at Kennedy Airport uncovered 8 kilograms of hashish oil concealed inside 8 cigarette cartons. She would have testified that one of the defendant's cousins had controlled her baggage for several hours prior to her departure from Beirut airport and that, without her knowledge, he placed the hashish oil in her luggage. Another witness, Sam Mina, would have confirmed Golding's testimony. He would have testified that on the day of Golding's arrest he had been informed by the other cousin that Golding was innocent and that "my people set it up and we duped her to bring it in." *Id.* 911-12. The defendant offered this evidence, pursuant to Fed. R. Evid. 404(b), as prior similar acts evidencing a common plan to import narcotics from Lebanon using innocent dupes. Like the Fifth Circuit in *Stevens*, the Second Circuit concluded that a less restrictive standard should be applied when considering the admission of reverse 404(b) evidence, as opposed to when the Government attempts to use 404(b) evidence against an accused. *Id.*

The Ninth Circuit has also taken the view that 404(b) applies when other acts evidence is offered against third parties. *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir. 1991). In *McCourt*, the Ninth Circuit did not specifically resolved [sic] the question whether a less restrictive approach should apply when reverse 404(b) evidence is offered by an accused. *Id.* However, the Ninth Circuit stated "it may well be that courts should indulge the accused when the

defendant seeks to offer prior crimes evidence of a third person for an issue pertinent to the defense other than propensity. *Id.*, at 1236. After *McCourt*, the Ninth Circuit clarified and held that a court should indulge the accused when the defendant seeks to offer prior acts of a third person to prove or support a legitimate defense. *United States v. Cruz-Garcia*, 344 F.3d 951, 955 (9th Cir. 2003).

Hereimi offers the evidence for something other than propensity. He does not seek to prove that someone else committed the crime; rather he seeks to prove he was victim of Maad the con man. He contends he was misled or duped by Maad. He contends that Maad ingratiated himself to use him to further his criminal activities and when discovered, Maad ran and left Hereimi holding the bag. Hereimi wishes to introduce evidence showing Maad has done this to others, and the evidence would tend to negate Hereimi's guilt by showing a lack of criminal intent. This evidence could clearly raise reasonable doubt in the minds of a fair juror, as to whether Hereimi acted with intent.

Hereimi also intends to introduce evidence of his prior good acts to rebut the Government's evidence of criminal intent. Reverse 404(b) includes evidence of "good acts" relied upon by a defendant to rebut allegations of criminality or criminal intent, which may be limited by Rule 404(b) considerations. *See, e.g.*, *United States v. Stevens*, 935 F.2d 1380, 1383 (3d Cir. 1991); *United States v. Shavin*, 287 F.2d 647, 654 (7th Cir. 1961). However, because the evidence is

proffered by the defense, and not the prosecution, the more liberal standard for admissibility should apply. *See United States v. Williams*, 458 F.3d 312, 313-14 (3d Cir. 2006). Because Rule 404(b) was primarily intended to protect defendants, " 'a lower standard of similarity should govern "reverse 404(b)" evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations.' " *Williams*, 458 F.3d at 316 (*quoting United States v. Stevens*, 935 F.2d 1380, 1383 (3d Cir. 1991)) *Cf: United States v. Spencer*, 1 F.3d 742, 744-45 (9th Cir. 1992) (Rule 404(b) may be invoked by the defendant or the prosecution and the tests [sic] is whether introduction of the evidence may tend raise reasonable doubt about an essential element of the offense).

Because the evidence is admissible under Rule 404(b), it is arguable that a Rule 403 analysis must also be made. Although the federal circuit courts handle offers of reverse 404(b) evidence in different ways, there are two general standards for admitting evidence of other bad acts by third parties. The first standard requires the court to consider only what it must consider for any proffered evidence: the relevance of the evidence and the balance of probative value with Evidence Rule 403 considerations. *See United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). The other standard requires courts to apply 404(b) analysis and a finding that probative value is not outweighed by Evidence Rule 403 considerations. *See United States v. Cruz-Garcia*, 344 F.3d 951, 955 (9th Cir. 2003).

The facts in *United State* [sic] *v. Cruz-Garcia* are similar to the facts in this case, and in light of these facts, Rule 403 consideration will not result in exclusion of defense evidence. The Ninth Circuit held that even though evidence is admissible under 404(b), it may nonetheless be excluded under Rule 403's balancing test, which weighs the "probative value" of the evidence against the "danger of unfair prejudice." *Id.*, at 956. There, the Court noted that the district court must already have engaged in a similar balancing when it admitted Meza-Castro's prior conviction under Rule 609. *Id.* It then went on to conclude that because, pursuant to the ruling, the jury was told about Meza-Castro's prior drug conviction, the only question left is whether the government suffered unfair prejudice by further admission of the facts underlying that conviction. *Id.* In other words probative value was not at issue; rather the only issue was the danger of unfair prejudice. *Id.* The Court continued to explain that because the witness had already been revealed to the jury as a drug dealer, a criminal and a conspirator, the Court could not see how the Government could be prejudiced by the admission of other facts relevant to those admissions. *Id.*

Here, the Government has already admitted evidence and characterized Maad as a con man, and the Government concedes that Maad's character for truthfulness, and deceptiveness should be admissible by opinion or reputation testimony. The Government called Maad's probation officer and has already given the jury the impression that Maad was a con man. If

the Ninth Circuit's decision in *United State* [sic] *v. Cruz-Garcia* is followed, the probative value of other facts tending to show that Maad was a con man that used others to further his own, criminal financial interest should not be in question. Likewise, the danger of unfair prejudice is non-existent because the Government has set the stage for this evidence to be admitted.

CONCLUSION

Although the term "reverse 404(b) evidence" may be a misnomer, Court considering the use of 404(b) evidence by an accused, including the Ninth Circuit, have said that an accused should be given more leeway as to admission of that evidence if the evidence is offered for something other than propensity. Here, Hereimi offers the evidence to raise reasonable doubt as to his criminal intent. While this Court must also apply Rule 403 considerations to determine admissibility, the only consideration at issue here is the danger of unfair prejudice because the Government has painted Maad as a con man, and a deceptive, dishonest individual. In this Circuit, once the door is part way open as to admission, swinging the door wide open does not cause undue prejudice and therefore, Hereimi must be allowed to admit this relevant evidence to show that he was duped and he lacked criminal intent.

DATED this 23rd day of August 2008.

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The undersigned certifies that a copy of this document was faxed to Counsel for the Government.

_____ _____
Date Signature

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

UNITED STATES OF AMERICA Plaintiff, vs. IMAD SALIM HEREIMI, Defendant.	Case No. 3:08-cr-00007-02-JKS Anchorage, Alaska Monday, August 25, 2008 9:05 o'clock a.m. **TRIAL BY JURY – DAY 6**

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES K. SINGLETON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	RETTA-RAE RANDALL, ESQ. Assistant U.S. Attorney U.S. Attorney's Office 222 West 7th Avenue, #9 Anchorage, Alaska 99513-7567 (907) 271-5071
For the Defendant:	THEODORE STEPOVICH, ESQ. Law Office of Ted Stepovich 841 I Street Anchorage, Alaska 99501 (907) 272-9322
Court Recorder:	APRIL KARPER U.S. District Court 222 West 7th Avenue, #4 Anchorage, Alaska 99513 (907) 677-6102

[5-169] interference.) Yep, thanks. Bye.

(Pause)

(Jury out at 4:18 p.m.)

THE COURT: Thank you. Very well. The objections that the Court has had to deal with are basically Federal Rule of Evidence 404, which states that evidence of a person's character, whether present or not, or a trait of character is not admissible for the purpose of proving action and conformity therewith on a particular occasion, and then there are sub-categories for the accused in a criminal case – and strictly speaking, Maad doesn't meet that test 'cause he's gone – the alleged victim, and then the character of a witness, and the character of a witness can only be explored pursuant to Federal Rule of Evidence 607, 608, and 609.

Now, to the extent that the State is using hearsay statement of Michael Maad under the co-conspirator exception to the hearsay rule, he becomes a witness, and he can be impeached or attacked on any of the grounds that you could impeach or attack a witness, but you can't – we've already gotten evidence that he's been convicted of a felony, that's one element of impeachment.

The other matter all seems to be improper character evidence, and then the – the other concern is that you certainly can introduce evidence of good character of Mr. Hereimi, but you've got to do it in conformity with the rules, [5-170] and simply asking

this witness if he's done an investigation of Mr. Hereimi and – you know, I don't know if that qualifies under the rule, although this is your opportunity to convince me that it does.

MR. STEPOVICH: Your Honor, I – this – this is actually an issue that we are really going to have to get into in this case because I had some additional witnesses as to prior bad acts on the part of Mr. Maad, okay?

THE COURT: All right. Very well.

MR. STEPOVICH: And –

THE COURT: They would have to – the – under 404, you can introduce prior bad acts of Mr. Maad, but not to show propensity. It would have to be to show something else and his knowledge and – and intent are not really an issue, are they?

MR. STEPOVICH: Well, Your Honor, it was – it is one of the things – and I am prepared to argue these points – I'm preparing to argue these points.

THE COURT: Okay.

MR. STEPOVICH: I've started – I've started – we've done – done some research and I've got – I – I would like an opportunity – this is – I guess it's part and parcel to the – to my witnesses that I'm going to be putting on here. It seems like it's now an issue here in asking the investigating officer what he did in regards to the investigation, what he looked into the background of my client.

[5-171] There seems to be case law that stands for the proposition that when an individual believes, or the defense as in this case, that we have been duped the same as the State and the same as prior victims of Mr. Maad, that such testimony is admissible to show his modus of operation and his plan. And I – you know, I – I – I think that we're really going to have to deal with these issues.

THE COURT: Well, if – if – if you have any case law dealing with situations where an alleged accomplice attempts to exonerate himself by showing that he was misled or something by showing propensity evidence of the alleged principle to mislead, I'd like to see it because it seems it would fall squarely under 404.

MR. STEPOVICH: It's not propensity evidence though. It's – it's the plan.

THE COURT: Well, except that the Ninth Circuit has taken a very narrow range of plans. Now, of course, if you could show that Mr. Maad had enticed other people into similar situations, the Court would certainly hear from you on that, but just to say that the scheme or plan is to be a crook, a thief, a cheat, you know, that's – that's just propensity evidence. The scheme or plan has to be much more specific than just a general allegation this guy cheats everybody he ever comes in contact with, which is propensity.

MR. STEPOVICH: Well, I – I understand that, Your [5-172] Honor.

THE COURT: No, but again, you – you've indicated you're working on it, I'm certainly not going to ask you to –

MR. STEPOVICH: I – I – oh, no –

THE COURT: – prematurely address it.

MR. STEPOVICH: Yeah.

THE COURT: If you case law –

MR. STEPOVICH: That – what I –

THE COURT: – fine.

MR. STEPOVICH: What I would like is if – it – probably most appropriate is if we go ahead and address it first thing Monday –

THE COURT: Sure.

MR. STEPOVICH: – prepare to argue it.

THE COURT: All right.

MS. RANDALL: Judge, these kind of motions are prepared in a written fashion and filed in the Court to give the opposing counsel a heads up as to what the allegations are. Mostly this is done prior to trial so these issues don't delay a trial. So I object because this isn't timely. I would also ask that Mr. Stepovich be instructed to provide me with his written motion and the case law by five o'clock tomorrow, Saturday, so that I can be prepared to address what he's doing on Monday or we're going to end up

spending all Monday morning arguing and continuing this case.

[5-173] THE COURT: We're going – well, I agree, we're not going to do that. The Court will certainly read the cases if you – if you cite them, but it – it has to be a case that is relatively similar to the facts of this case and distinguishes between plan or scheme and – and propensity.

Ms. Randall has a good point though. If she's going to be prepared on Monday and we're not going to have to take a two or three-hour recess while she hits Westlaw to pull the cases, you're going to have to give her the citations over the weekend. Can you have it to her by five o'clock tomorrow afternoon?

MR. STEPOVICH: Umm –

THE COURT: That'll give you the rest of this evening and all day tomorrow to do that.

MR. STEPOVICH: Yeah, I know.

THE COURT: And we're talking – I mean, we're within a very narrow area.

MR. STEPOVICH: Yeah, it is. I –

THE COURT: The – you've got what, twenty years now of – of developing case law under Rule 404, 607, 608, and 609. Weinstein has devoted chapters to this as has Salsburg, as have others whose names temporarily escape me. I'm – I think that there's some addenda to Wigmore on all this as well, so I mean, there are discrete areas to look.

MR. STEPOVICH: Yeah, I – I would try to have it

* * *

[6-19] regards to what Mr. Hereimi's work – work ethic is, his life is like, et cetera, and that – and that's it.

THE COURT: Okay. Very well. Well, the – nothing I say in ruling on this issue should be in any way taken as a limitation on what Mr. Hereimi may say during his examina – his direct examination about his relationship with Mr. Maad. Certainly, he can testify that – if in fact it's true, that – that in discussions about the interplay between Maad's position with the State and the contracts that he was triggering for Horizon Graphics, that Maad assured him over and over that there was nothing wrong with that, that it was perfectly okay, and that – that Mr. Hereimi shouldn't be concerned about that at all. So, clearly that's okay.

The question is to what extent under so-called reverse 404 evidence should Mr. Hereimi be permitted to offer the testimony of Vicki Gutierrez as to transactions in 1981 wherein Mr. Maad and Ms. Gutierrez were married, Mr. Maad was working for Mr. – Ms. Gutierrez' father in Kentucky, I believe, and that during that time it transpired that Mr. Maad was stealing from the clinic – stealing from Ms. – Ms. Gutierrez' father? That would be item number one.

Item number two would be after the two of them came to Alaska – the two being Vicki and – and Mike – Mike went to work for Harry's Menswear and basically embezzled from him. And the theory is that that evidence tends to show that Mike [6-20] ingratiates himself with people and then cheats and steals from them.

Now I suppose that – clearly, Mike Maad's intent is overwhelmingly established in the record. His – Mike Maad's knowledge is overwhelmingly established in the record. Any evidence regarding Maad's intent and knowledge would be cumulative. What is being offered here is basically propensity, that Maad had the propensity to lie, steal and cheat people he – who trusted him.

And I considered the possibility that you might – recognizing that similarity is – is relaxed where it's the defendant offering it to see – could – could this qualify as a common scheme or a plan? And I think the answer is no, it took place over too – too much time. Common scheme or plan tends to refer to – first of all, tends to refer to recent acts used to show identity, here identity is not an issue, so I think all you would have would be that – that, you know, Maad was just a kind of guy that did this kind of thing, and that's propensity evidence and clearly inadmissible as the Ninth Circuit points out in *McCord*.

All right. If I am wrong there, if the Ninth Circuit is moving in the direction of holding that propensity evidence can be introduced despite Rule

404(b), where it is the defendant that is introducing the evidence and it is a third party or a co-defendant or co-conspirator's propensity that is [6-21] in issue – if I'm wrong about that and the Ninth Circuit does in fact wish to go that way, then it seems to me this evidence runs afoul at 403.

As the Second Circuit pointed out in one of the cases cited by Mr. Hereimi, the evidence that Maad had cheated others, ingratiating himself with others in order to cheat them, as proof that he in fact successfully cheated them from which the inference should be drawn that he successfully fooled or befooled Mr. Hereimi, the nexus there is – is very, very weak, and that evidence is very weak, so it's probative value is – is very limited.

On the other hand, and what Wigmore calls the rules of auxiliary policy, to get into whether Mr. Maad did in fact defraud Vicki's father and whether the circumstances of that defrauding was sufficiently similar to – to permit inferences about Maad's ability to defraud Hereimi, would in effect run the risk of the sideshow which follow up the circus to coin a phrase of McCormick's.

By the same token, the little we know about the dealings with Harry seem to indicate that we're talking merely about propensity of Maad. And again, if the issue is Mr. Hereimi's knowledge and intent, anything about Harry would be a very, very – support a very weak inference as to Maad's ability to defraud Hereimi. Hereimi, after all, is a different person.

[6-22] And no one has suggested, and I've heard no suggestion that Mr. Hereimi is other than what he appears to be, a successful Anchorage businessman who's competed successfully in this community for many years. No one's suggesting he's particularly gullible, no one's suggesting he's the kind of person that con men can easily get to, so if the jury is going to draw any inferences about that at all, it's going to have to be out of the particular relationship between Hereimi and Maad, not Maad's relationship with others.

So for those reasons, the Court finds that the inferences that Mr. Hereimi would draw are of weak probative value and that they're outweighed in a 403 analysis by the expansion of the issues in this case, the danger that the jury's attention will be distracted from the issues in this case to Mr. Maad's dealings with strangers in the past, and the general confusion that would result.

So as to the two incidents, Vicki's father and Harry, the Court finds they're too remote, probative value is weak, and that they're outweighed by any – by so-called rules of auxiliary policy. And that assumes that the Ninth Circuit would be prepared to relax the rule against no propensity and allow propensity evidence against a third party where offered by the defendant.

If the *McCord* case remains the law of the Ninth Circuit, then, of course, since the evidence would be pure [6-23] propensity evidence, it would be excluded

on that basis. Now you clearly can bring in the daughter, the wife, people who knew Maad well to testify that his reputation in the community for truthfulness and honesty is poor. That – that's clear. And you can certainly offer evidence from men and women who know Mr. Hereimi's reputation in the community. You can certainly offer evidence to show that his reputation is good for honesty and integrity.

Very well. Is there anything further?

MS. RANDALL: No, sir.

MR. STEPOVICH: Your Honor?

THE COURT: Do you need a break before I bring in the jury?

MR. STEPOVICH: Yeah, we have a little – we will need just a short break.

THE COURT: Sure.

MR. STEPOVICH: As the Court may have noted, Mr. Hereimi was here at nine o'clock this morning –

THE COURT: Yeah, I did.

MR. STEPOVICH: – and that's 'cause his son is ill.

THE COURT: Oh, I'm sorry.

MR. STEPOVICH: And has flu-like symptoms, and Mr. Hereimi, based upon his symptoms today, believes that he'll probably be not going to

school tomorrow, so we can start at nine o'clock if the jury's available.

INSTRUCTION NO. 3

Imad Salim Hereimi is charged in Counts 1-22 of the indictment with aiding and abetting Nezar "Mike" Maad in Honest Services Fraud by Mail in violation of Sections 1341 and 1346 of Title 18 of the United States Code. In order for Hereimi to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First: Nezar "Mike" Maad made up a scheme or plan to deprive the State of Alaska of its intangible right to his honest services by concealing material facts from his employer the State, *i.e.* his relationship with Horizon Graphics;

Second: Maad acted with the intent to deprive the State of Alaska of its intangible right to honest services; and

Third: Maad used, or caused someone to use, the mails to carry out or attempt to carry out the scheme or plan, in that on or about each date alleged in each of Counts 1-22 of the indictment, as a result of Maad's actions, State of Alaska Treasury Warrants were mailed to Horizon Graphics.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as an

important part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Honest Services Fraud exists where a state employee fails to disclose a conflict of interest to his employer in anticipation of personal gain. In order to find honest services fraud, you must find that Maad was under a legal duty to disclose his relationship with Horizon Graphics to his State employers, that Maad breached that duty by concealing his relationship with Horizon Graphics, and that his concealment was "material." A concealment is material if it has a natural tendency to influence or to be capable of influencing the decision of the decision maker from whom it was concealed.

You are further instructed that state employees are under a legal duty to disclose potential conflicts of interest to their state employers.

The Government alleges Mike Maad committed honest services fraud on or about the dates listed in the following table. Each count is shown with the alleged date, warrant number, amount, and Horizon Graphics' Invoice number.

COUNT	DATE MAILED	WARRANT NUMBER	AMOUNT	HORIZON GRAPHICS INVOICE
1	11/04/2005	21885003	$ 672.00	100220
2	12/05/2005	21916738	$ 1660.00	100221

4	12/21/2005	21938684	$ 4077.50	100235
5	1/04/2006	21950004	$ 1300.00	100245
6	1/20/2006	21969232	$ 1159.00	100255
7	1/25/2006	21973429	$ 104.00	100249
9	1/26/2006	21975176	$ 156.00	100254
10	2/07/2006	21989163	$ 1660.00	100253
11	2/28/2006	22013707	$ 1675.00	100256
12	3/06/2006	22020099	$ 996.00	100264
13	3/08/2006	22024292	$ 104.00	100263
14	3/15/2006	22033048	$ 4825.00	100266
15	3/16/2006	22034702	$ 342.00	100259
16	3/28/2006	22045704	$ 890.00	100265
17	04/11/2006	22061866	$ 385.00	100268
18	04/14/2006	22067893	$ 104.00	100270
19	04/25/2006	22079008	$ 268.00	100273
20	04/26/2006	22081363	$ 52.00	100275
21	05/05/2006	22093935	$ 968.00	100280
22	05/16/2006	22105870	$ 1340.00	100279

The Government must, in addition, prove beyond a reasonable doubt:

Fourth: Honest Services Fraud by Mail was committed by Maad on or about the dates alleged as to each count;

Fifth: Hereimi knowingly and intentionally aided or counseled Maad to commit the crime of Honest Services Fraud by Mail; and

Sixth: Hereimi acted before the crime was completed.

It is not enough that Hereimi merely associated with Maad or unknowingly or unintentionally did things that were helpful to Maad, or was present at the scene of the crime.

The evidence must show beyond a reasonable doubt that Hereimi acted with the knowledge that Honest Services Fraud was being committed by Maad and with the intention of helping Maad commit the crime of Honest Services Fraud by Mail.

INSTRUCTION NO. 6

You may find that the Defendant acted knowingly if you find beyond a reasonable doubt that the Defendant:

1. was aware of a high probability that Mike Maad had not disclosed to the State of Alaska, his employer, his relationship with Horizon Graphics, i.e., Maad's conflict of

interest, and that Maad was using his official position for their personal gain, and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that Hereimi actually believed that there was no conflict of interest, or that a conflict existed, but that Maad had disclosed it to the State, or you find that the Defendant was simply careless.

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

UNITED STATES OF AMERICA Plaintiff, vs. IMAD SALIM HEREIMI, Defendant.	Case No. 3:08-cr-00007-02-JKS Anchorage, Alaska Monday, August 25, 2008 9:05 o'clock a.m. **TRIAL BY JURY – DAY 6**

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES K. SINGLETON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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[7-146] in the Eastern District of Pennsylvania. And to the extent that the case provides anything of – of substance that would be persuasive, I think both sides now agree that the instructions must provide that in order to be convicted, Mr. Hereimi must have known of – not only of the conflict of interest, but of Mr. Maad's duty to disclose it to his employers before engaging in the Horizon Graphics business. So the jury instructions as currently written do say that.

MR. STEPOVICH: I – Your Honor, I – I disagree. I disagree that the jury instructions as they – as they are – the instruction number six –

THE COURT: No, no. I'm saying the instructions say that he has to know; however, instruction number six just says that in any case in which knowledge is a requisite, deliberate ignorance constitutes knowledge.

MR. STEPOVICH: Well, I – the instruction itself infers that a duty exists. It infers that there is knowledge of disclosure. Number six –

THE COURT: Is a – is a pattern jury instructions.

MR. STEPOVICH: But for this case, it – it infers that there's – number one, that there is knowledge as to the duty to disclose. Nowhere in here does it address that issue.

THE COURT: I'm sorry. What language do you say infers that there's a duty to disclose?

MR. STEPOVICH: Nowhere in here does it say – state [7-147] that – first, that it has to be established that he has knowledge of the disclosure. It goes in and says, "was aware of the high probability that Mike Maad" –

THE COURT: No, no. That's an alternative. In other words three and six are alternatives.

MS. RANDALL: And five defines knowingly –

THE COURT: Yeah. No, *Heredia – Heredia* goes into that at great length and talks about that, clearly, instruction six is superfluous if in evaluating instruction three, the jury finds beyond reasonable doubt that Mr. Hereimi had actual knowledge. So if he has actual knowledge, there's no need for them to even move to six. What six says is that an alternative is that if you don't find – in other words, if, after listening to all the evidence, you do not find beyond a reasonable doubt that he had actual knowledge, you may nevertheless convict him if you find that he had – he knew a high probability of – of the duty to disclose and failure to disclose, and was deliberately ignorant or took steps to be – trying to remember what six says exactly.

MS. RANDALL: Deliberately avoided (indiscernible – voice too low).

THE COURT: Yeah. And that's – and all of that's discussed at great length in the Ninth – Ninth

Circuit's *en banc* opinion. Now, of course, the Court has –

MR. STEPOVICH: Well –

[7-148] THE COURT: No, go ahead. Go ahead.

MR. STEPOVICH: Maybe I'm being very dense about this and not – and not following it too well –

THE COURT: Uh-huh (affirmative). But I –

MR. STEPOVICH: – but I'd like – I –

THE COURT: – I make no comment on that.

MR. STEPOVICH: Thank you. But I – I want – I would like to know what language in – in three talks about this actual knowledge.

THE COURT: Okay. It's on the second page of three. Well, actually, I guess it's the third page:

> "The Government must in addition prove beyond a reasonable doubt:"
>
> . . .
>
> "Fourth. Honest services mail fraud by mail was committed by Maad on or about the dates alleged as to each count.
>
> "Fifth. Hereimi knowingly and intentionally aided or counseled Maad to commit the crime of honest services fraud by mail; and

> "Sixth. Hereimi acted before the crime was completed.
>
> "It is not enough that Hereimi merely associated with Maad or unknowingly or unintentionally did things that were helpful to Maad, or was present at [7-149] the scene of the crime. The evidence must show beyond a reasonable doubt that Hereimi acted with the knowledge that honest services fraud was being committed by Maad and with the intention of helping Maad commit the crime of honest services fraud by mail."

And then in five:

> "An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The Government is not required to prove that Hereimi knew that his acts or omissions were unlawful. The Government must prove that Hereimi knew that Maad had concealed the conflict of interest from the State in connection with Maad's activities on behalf of Horizon Graphics. You may consider evidence of Hereimi's words, acts, or omissions along with all the other evidence to decide whether the defendant had acted knowingly."

I'm assuming that we're all reading off the same page. In other words, we all have the same packet. And this packet is one that was furnished to you a couple of days ago with the exception of some changes to instruction number three, but the changes to instruction number three, as I remember them, all

related to Maad's actions, not to Hereimi's. So I don't think we changed the part that says that Hereimi has to have actual [7-150] knowledge and intent to help, you know, the crime.

MR. STEPOVICH: I don't see where it says in here that he has to – that he know – that he knows – it must be proven beyond a reasonable doubt that he knew about his reporting – that he had a duty to report a conflict of interest. It doesn't say that.

THE COURT: Well, I don't know how you would say it any clearer.

MR. STEPOVICH: It says the Government must prove that Hereimi knew that Maad had concealed a conflict of interest, it doesn't say that he – that he knew that he had a duty as to the conflict of interest.

THE COURT: Well, it says –

MR. STEPOVICH: I think it needs to be –

THE COURT: – Hereimi knowingly and intentionally aided or counseled Maad to commit the crime – yeah. Maad can't commit the crime unless he had a duty to disclose.

MR. STEPOVICH: And my –

THE COURT: That's what it says in the first part of three.

MR. STEPOVICH: And my guy can't commit the crime unless he knows that Mike had that duty.

MS. RANDALL: Or deliberately avoided learning that Mike had a duty.

THE COURT: Well, that's a separate issue.

[7-151] MS. RANDALL: Right.

THE COURT: Yeah. Okay. You – you made your point.

MR. STEPOVICH: Well –

THE COURT: Let's go on to the next issue.

MR. STEPOVICH: I –

THE COURT: What –

MR. STEPOVICH: – I – I – Your Honor, you're saying that it says in this instruction that in order to be convicted, my guy had to know that Mike had a duty to disclose a conflict of interest.

THE COURT: Well, yeah, yeah, it does. In – in the first part when we're talking only about Maad, it says –

MS. RANDALL: At the bottom, it defines honest services fraud.

THE COURT: Yeah.

MS. RANDALL: Where a state employee fails to disclose a conflict of interest –

THE COURT: In anticipation of personal –

MS. RANDALL: – in anticipation of personal gain.

THE COURT: – personal gain. In order to find honest services fraud, you must find that Maad's concealment of his relationship with Horizon Graphics was material.

MR. STEPOVICH: Then it should say something to the effect and that Hereimi knew –

THE COURT: Well, we don't get to Hereimi yet. We [7-152] don't get to Hereimi until we get to the next page:

> "The Government must in addition prove beyond reasonable doubt honest services fraud by (indiscernible) by mail was committed by Maad"

He only commits the crime if he – if he has a duty to – to disclose and fails to do so.

MR. STEPOVICH: I think that this – this instruction makes a jump and creates the assumption that my client knew. I think that it'll create that impression, and that – that's – that's what –

THE COURT: Very – very well –

MR. STEPOVICH: – that's – and I –

THE COURT: I can't see that, so since I can't see it, I can't rule in your favor, so I rule against you, and I find that the instruction does accurately

and adequately convey the idea to the jury that it cannot convict Mr. Hereimi unless, one, it finds that Maad would be guilty if he were here, namely, that he committed honest services fraud by concealing his relationship with Horizon Graphics from his employer at a time when he was steering business to Horizon Graphics. That's the crime that Maad commits. And it can't fine Mr. Hereimi guilty unless it finds that he aided and abetted Maad which means he knows what Maad was doing and intended to help him. That's what the instruction says. Absolutely.

MR. STEPOVICH: I just think it –

[7-153] THE COURT: Okay.

MR. STEPOVICH: – I think it needs to get spelled out.

THE COURT: Well, it's spelled out as best I could do it. From the Government only, were there any other objections to the jury instructions?

MS. RANDALL: No, sir. The verdict forms were changed per my request and that was the only other –

THE COURT: Yeah.

MS. RANDALL: – concern I had.

THE COURT: The change was to do two things really, although it may have been done in separate drafts. The first was to place the date in the body of each verdict, and the second was to make it

clear that the charge is aiding and abetting honest services fraud and not honest services fraud.

Okay. Mr. Stepovich, is there any other objection to any of the jury instructions?

MR. STEPOVICH: Yeah, (indiscernible) – objection along the same lines as to number six. I understand the Court is saying that that is purely from the basis of inferring knowledge.

THE COURT: Well –

MR. STEPOVICH: But I – I put –

THE COURT: – since – since Judge Kozinski went to such great length to discuss the rule, and in the process [7-154] speaking for an *en banc* majority overruled all kinds of earlier cases – and there – there's a – a very clear dissent from Judge Kleinfeld – well, concurrence from Kleinfeld is really a dissent, and then a dissent from Judge Graber joined in by four or five other judges – it wasn't my intention to go into great length in explaining it because I thought –

MR. STEPOVICH: No, no. I just want to put my –

THE COURT: – Kozinski did.

MR. STEPOVICH: – I'd like to just put my objection on the record.

THE COURT: Oh, sure.

MR. STEPOVICH: Okay.

THE COURT: Sure.

MR. STEPOVICH: I think that this with the – in conjunction with with three, six will effectively remove that knowing requirement of my client in regards to the existence of – of a duty to disclose a conflict of interest –

THE COURT: Mm-hmm (affirmative).

MR. STEPOVICH: – and it can cause the jury just to say without him knowing, you know – I'll – I'll leave it at that 'cause the –

THE COURT: Okay.

MR. STEPOVICH: – I – I –

THE COURT: Okay. That – that objection is noted.

MS. RANDALL: Judge, I would just like to make clear

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. IMAD SALIM HEREIMI Defendant.	Case No. 3:08-cr-00007 JKS JDR VERDICT FORM

Count 1

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about November 4, 2005, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 2

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about December 5, 2005, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 4

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about December 21, 2005, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 5

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about January 4, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 6

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about January 20, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 7

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about January 25, 2006, in

violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 9

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about January 26, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 10

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about February 7, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 11

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about February 28, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 12

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about March 6, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 13

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about March 8, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 14

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about March 15, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 15

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about March 16, 2006, in

violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 16

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about March 28, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 17

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about April 11, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 18

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about April 14, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 19

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about April 25, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 20

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about April 26, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 21

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about May 5, 2006, in violation of Sections 1341 and 1346 of Title 18 of the United States Code.

Count 22

We, the jury, find the Defendant, IMAD SALIM HEREIMI, [NOT GUILTY OR GUILTY] GUILTY on the charge of Aiding and Abetting Honest Services Fraud by Mail on or about May 16, 2006, in violation

of Sections 1341 and 1346 of Title 18 of the United States Code.

DATED this 29th day of August 2008, at Anchorage, Alaska.

SIGNATURE REDACTED
Jury Foreperson

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

No. 09-1035

In the Supreme Court of the United States

IMAD SALIM HEREIMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in giving a deliberate ignorance instruction.

2. Whether the district court abused its discretion in excluding defense evidence of other bad acts committed by petitioner's accomplice.

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In the Supreme Court of the United States

No. 09-1035

IMAD SALIM HEREIMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2009. The petition for a writ of certiorari was filed on February 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of 20 counts of committing honest-services fraud by mail, in violation of 18 U.S.C. 1341. Pet. App. 4. He was sentenced to five years of probation and ordered to pay res-

titution and a fine, each in the amount of $13,219.91. *Id.* at 5-13. The court of appeals affirmed. *Id.* at 1-2.

1. a. Petitioner was convicted of 20 counts of violating 18 U.S.C. 1341, which makes it illegal to use the United States Postal Service or any private commercial interstate carrier for the purpose of executing a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The code defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see Pet. App. 22.

The charges stemmed from petitioner's association with Nezar Khaled "Mike" Maad, who was indicted with petitioner. Pet. App. 16-22. Maad was employed by the State of Alaska as a Publication Technician II for Financial & Management Services, a branch of the State's Department of Health and Social Services (DHSS). 8/20/08 Tr. 111; 8/21/08 Tr. 88. His duties included writing and designing printed material for publication by DHSS. 8/21/08 Tr. 143-144. In 2005 and 2006, Maad and petitioner, the owner of a donut shop, 8/20/08 Tr. 30, carried out a scheme to defraud Alaska and its citizens of public funds and of their right to Maad's honest services as a public employee. Pursuant to the scheme, petitioner obtained an Alaska business license for Horizon Graphics. 8/20/08 Tr. 152; 8/21/08 Tr. 122; 8/22/08 Tr. 32, 41-42. Thereafter, Maad arranged for state printing orders to be completed at set prices by various printing companies in the Anchorage area and elsewhere. 8/20/08 Tr. 31-32, 41, 66; 8/21/08 Tr. 67, 75, 134-135; 8/22/08 Tr. 92-116, 118-127. Maad paid the companies with cash or by using credit cards previously obtained by petitioner for Horizon. 8/20/08 Tr. 39-42, 47-

50, 108, 153; 8/21/08 Tr. 66-72, 67-75, 212; 8/22/08 Tr. 18-19, 56-57. Petitioner and Maad then created invoices for the printing jobs in the name of Horizon, inflating the prices but adding no value, 8/22/08 Tr. 92-116, 118-127, and Maad submitted the inflated invoices to the State for payment, 8/21/08 Tr. 21; 8/22/08 Tr. 92-116, 118-127. After Maad received the payments, he mailed them to petitioner for deposit into Horizon's bank account. 8/20/08 Tr. 141-149; 8/21/08 Tr. 29-50; 8/22/08 Tr. 39-41. As a "business," Horizon consisted only of a stack of paperwork and a ledger checkbook kept on a shelf in the business office of petitioner's donut shop. 8/22/08 Tr. 35. Petitioner told authorities that he did not know how much Horizon had made from the State because it was hard to keep track of how many checks he had received. Gov't C.A. S.E.R. 17.

b. At trial, petitioner argued that he lacked the requisite criminal intent because he had been duped by Maad. See Pet. App. 24. In support of that defense, petitioner sought to introduce evidence of Maad's poor reputation for honesty and his history of ingratiating himself with people and then cheating or stealing from them. *Id.* at 24-25. Specifically, petitioner sought to introduce evidence that Maad had embezzled money from the business of his then-father-in-law in 1981 and had stolen money and items of clothing from a men's clothing store in which he worked. *Ibid.* The district court denied petitioner's motion to introduce such evidence. See *id.* at 37-48. Although the court noted that petitioner sought to introduce the evidence to show Maad's "propensity to lie, steal and cheat people * * * who trusted him"—an improper purpose under Federal Rule of Evidence 404(b), Pet. App. 44-45—the court excluded the evidence under Federal Rule of Evidence 403

because the prejudicial effect of the evidence outweighed its probative vlaue, Pet. App. 45-47. The court reasoned that the nexus between the prior incidents and the charges against petitioner was "very weak", *id.* at 45; that the incidents were "too remote" to be probative, *id.* at 46; and that their probative value was outweighed by the danger that the evidence would confuse the jury by shifting its attention from the issues in the case to Maad's dealings with third parties in the past, *ibid.*

c. In charging the jury, the district court instructed that, in order to convict petitioner of honest-services fraud, the jury must find "beyond a reasonable doubt that [petitioner] acted with the knowledge that Honest Services Fraud was being committed by Maad." Pet. App. 52. The court added:

> An act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake, or accident. The Government is not required to prove that [petitioner] knew that his acts or omissions were unlawful. The Government must prove that [petitioner] knew that Maad was under a duty to disclose material conflicts of interest to his state employers and that he concealed a material conflict of interest from the State in connection with Maad's activities on behalf of Horizon Graphics.

Gov't C.A. S.E.R. 38. The court then gave the jury the following deliberate ignorance instruction:

> You may find that [petitioner] acted knowingly if you find beyond a reasonable doubt that the [petitioner]:
>
> 1. was aware of a high probability that Mike Maad had not disclosed to the State of Alaska * * * his relationship with Horizon Graphics, i.e., Maad's

> conflict of interest, and that Maad was using his official position for their personal gain, and
>
> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that [petitioner] actually believed that there was no conflict of interest, or that a conflict existed, but that Maad had disclosed it to the State, or you find that [petitioner] was simply careless.

Pet. App. 52-53. The jury found petitioner guilty of 20 counts of honest-services fraud by mail. *Id.* at 4.

2. On appeal, petitioner argued that the district court erred in excluding the prior-bad-acts evidence concerning Maad's embezzelment of money from his former father-in-law and his theft from a previous employer. The court of appeals rejected that argument, holding that the district court had not abused its discretion in finding that the evidence was inadmissible under Rule 403 because "the probative value of the evidence in question was substantially outweighed by its tendency towards unfair prejudice and confusion of the issues." Pet. App. 2. The court also noted that the district court "thought that the bad acts were too remote in time and too dissimilar to be properly admissible pursuant to Federal Rule of Evidence 404(b)." Pet. App. 2.

Petitioner also argued that the district court erred in giving the jury a deliberate ignorance instruction. Construing petitioner's argument as a challenge to "the propriety of deliberate indifference instructions in general," the court of appeals held that that argument was foreclosed by the Ninth Circuit's en banc decision upholding a deliberate ignorance instruction in *United States* v. *Heredia*, 483 F.3d 913, 924, cert. denied, 552 U.S. 1077 (2007). Pet. App. 2. The court also rejected petitioner's

"suggestion" that, to the extent deliberate ignorance instructions are permissible, one should not have been given in this case. *Ibid.*

ARGUMENT

Petitioner argues (Pet. 13-22) that the district court abused its discretion both in instructing the jury about deliberate ignorance and in declining to allow petitioner to introduce evidence of bad acts allegedly committed by Maad (petitioner's accomplice). His arguments do not warrant further review because the unpublished memorandum decision of the court of appeals affirming petitioner's convictions is correct and does not conflict with any decision of this Court or any other court of appeals.[1]

1. Petitioner contends (Pet. 13-16) that the district court erred in giving the deliberate ignorance instruction because it failed to include a "motive element"—by which he apparently means an instruction that, in order to find deliberate ignorance, the jury had to conclude that his motive in deliberately failing to learn the truth was to provide himself with a defense in case he should

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[1] Although petitioner was charged with honest-services fraud, he does not raise any objection to that theory in his petition for a writ of certiorari. In any case, any error in charging the jury on honest-services fraud would have been harmless. Based on the evidence presented to the jury, a rational jury could not have found a scheme to deprive the State of Alaska of its intangible right to honest services separate from a criminal scheme to obtain money through fraudulently over-billing Alaska for printing services. See *Moore* v. *United States*, 865 F.2d 149, 153-154 (7th Cir. 1989). Nevertheless, the Court may wish to hold the petition in this case pending its resolution of issues pertaining to honest-services fraud in *Black* v *United States*, No. 08-876; *Weyhrauch* v. *United States*, No. 08-1196; and *Skilling* v. *United States*, No. 08-1394.

be charged with a crime.[2] Because petitioner did not present that argument to the court of appeals, it is waived. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Even if it were not, he also did not object to the deliberate ignorance instruction in the district court on the basis that it should have included a motive element; therefore, his argument is at most reviewed for plain error. Fed. R. Crim. P. 52(b). In *United States* v. *Olano*, 507 U.S. 725, 732 (1993), this Court explained that Rule 52(b) requires a defendant to demonstrate that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights'"; even then, a reviewing court should correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Accord *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot satisfy any element of that analysis.

The district court did not err in instructing the jury about deliberate ignorance. The standard deliberate ignorance instruction given in federal courts does not include a requirement that the defendant acted based on a motive to create a defense. See 1 Leonard B. Sand et al., *Modern Federal Jury Instructions*, Inst. 3A-2 (2009); see also, *e.g.*, *United States* v. *Nektalov*, 461 F.3d 309, 313-314 (2d Cir. 2006); *United States* v. *Lizardo*,

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[2] Petitioner does not explain what type of motive instruction he would have had the court include, nor did he request a motive instruction in the district court. But courts of appeals cases discussing deliberate ignorance instructions indicate that including a motive element would entail informing the jury that it must find that the defendant's "motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime." *United States* v. *Heredia*, 483 F.3d 913, 919 (9th Cir. 2006) (en banc), cert. denied, 552 U.S. 1077 (2007).

445 F.3d 73, 85 n.7 (1st Cir.), cert. denied, 549 U.S. 1007 (2006); *United States* v. *Willis*, 277 F.3d 1026, 1031-1032 (8th Cir. 2002); *United States* v. *Wert-Ruiz*, 228 F.3d 250, 254-255 (3d Cir. 2000); *United States* v. *Delreal-Ordones*, 213 F.3d 1263, 1267-1269 (10th Cir.), cert. denied, 531 U.S. 915 (2000); *United States* v. *Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); *United States* v. *Beaty*, 245 F.3d 617, 619-620 (6th Cir.), cert. denied, 534 U.S. 895 (2001). Although several courts of appeals have noted that it is appropriate for a district court to give a deliberate ignorance instruction when the evidence shows that a defendant deliberately remained ignorant in order to maintain a defense to a later prosecution, none has held that such an instruction must include a motive prong. *United States* v. *Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *Willis*, 277 F.3d at 1032; *Delreal-Ordones*, 213 F.3d at 1267-1269. Thus, the court of appeals' decision upholding the district court's instruction does not conflict with any decision from this Court or any other court of appeals. That alone establishes that this issue does not merit further review.

In any case, petitioner does not even attempt to demonstrate that he satisfies the plain-error test. Relief under that test requires that petitioner show that any alleged error seriously affected the fairness, integrity, and public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002) (assuming an effect on substantial rights, but finding relief unwarranted under the fourth prong of plain-error analysis); *Johnson*, 520 U.S. at 469-470 (same). "The fourth prong is meant to be applied on a case-specific and fact-intensive basis." *Puckett* v. *United States*, 129 S. Ct. 1423, 1433 (2009). The fourth prong of plain-error review of

petitioner's forfeited claim takes into account the fairness of the trial as a whole. See *ibid.* ("We have emphasized that a '*per se* approach to plain-error review is flawed.'") (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)).

Petitioner has not established that the inclusion of a motive element would materially alter the effect of the deliberate ignorance instruction. The instruction's requirement that the jury find that a defendant acted deliberately to avoid learning the truth protects defendants whose actions were coerced, motivated by exigent circumstances, or unintentional. See *Heredia*, 483 F.3d at 920. Nor does petitioner argue that any omission from the jury instructions affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Thus, even if review of petitioner's jury-instruction claim were otherwise warranted, this case would be an inappropriate vehicle because he cannot obtain relief under the plain-error rule.[3]

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[3] Petitioner also suggests (Pet. 16)—though he does not develop any argument in support of his suggestion—that the district court's deliberate ignorance instruction permitted the jury to find that he acted with deliberate ignorance "based on a high probability, rather than proof beyond a reasonable doubt." That suggestions lacks merit because the instruction explicitly stated that, in order to convict petitioner based on deliberate ignorance, the jury must find "beyond a reasonable doubt" that (1) petitioner was aware of a "high probability" that Maad had not disclosed his conflict of interest to the State and that he was using his official position for private gain, and (2) that petitioner deliberately avoided learning the truth about these matters. Pet. App. 52-53. The courts of appeals have uniformly upheld or approved use of the "high probability" standard in deliberate ignorance instructions, and petitioner does not contend otherwise. See, *e.g.*, *Chaney* v. *Dreyfus Serv Corp*, 595 F.3d 219, 240 (5th Cir. 2010); *United States* v. *Chavez-Alvarez*, 594

2. At his trial, petitioner sought to introduce evidence that Maad had stolen from other people more than two decades before the acts alleged in the indictment in order to show that petitioner was not criminally culpable because Maad had duped him. Under Federal Rule of Evidence 404(b), although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," it is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988). Petitioner asks this Court to grant his petition to decide whether the prohibition in Rule 404(b) against introducing other-acts evidence in order to prove the propensity of a person to commit crimes applies to evidence of other acts committed by someone other than the defendant in order to support the defendant's defense. Further review of that issue is not warranted because the holdings of the district court and the court of appeals do not conflict with any decision of this Court or of any court of appeals, because the decisions were correct, and because review of that question would make no difference to the admissibility of the evidence petitioner sought to introduce even if his view of Rule 404(b) were to prevail.

Petitioner is incorrect in suggesting (Pet. 18-20) that the circuits disagree about whether a defendant seeking

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F.3d 1062, 1067 (8th Cir. 2010); *United States* v. *Garcia-Bercovich*, 582 F.3d 1234, 1237-1238 (11th Cir. 2009), cert. denied, 130 S. Ct. 1562 (2010); *United States* v. *Thomas*, 467 F.3d 49, 54 n.5 (1st Cir. 2006), cert. denied, 549 U.S. 1294 (2007); *United States* v. *Flores*, 454 F.3d 149, 158 (3d Cir.), cert. denied, 549 U.S. 1046 (2006); *Beaty*, 245 F.3d at 621-622; *United States* v. *Cruz*, 58 F.3d 550, 557 (10th Cir. 1995); *United States* v. *Feroz*, 848 F.2d 359, 360 (2d Cir. 1988).

to introduce other-acts evidence about a third party must satisfy Rule 404(b)'s proper-purpose requirement. On the contrary, the courts of appeals to have considered the question agree that a defendant seeking to admit such evidence under Rule 404(b) must do so for a proper purpose—*i.e.*, a purpose other than to show that the third party has a propensity to commit crimes. See, *e.g.*, *United States* v. *Myers*, 589 F.3d 117, 123-124 (4th Cir. 2009), petition for cert. pending, No. 09-10199 (filed Apr. 13, 2010); *United States* v. *Montelongo*, 420 F.3d 1169, 1174-1175 (10th Cir. 2005); *United States* v. *Lucas*, 357 F.3d 599, 604-605 (6th Cir. 2004); *Agushi* v. *Duerr*, 196 F.3d 754, 759-761 (7th Cir. 1999); *United States* v. *Stevens*, 935 F.2d 1380, 1404-1406 (3d Cir. 1991); *United States* v. *McCourt*, 925 F.2d 1229, 1235 (9th Cir.), cert. denied, 502 U.S. 837 (1991); *United States* v. *Cohen*, 888 F.2d 770, 776 (11th Cir. 1989); *United States* v. *Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984); *United States* v. *McClure*, 546 F.2d 670, 672-673 (5th Cir. 1977). Those courts have also held that any evidence admissible under Rule 404(b) must pass muster under Rules 401 and 403. See, *e.g.*, *Myers*, 589 F.3d at 124; *Montelongo*, 420 F.3d at 1174; *Lucas*, 357 F.3d at 605; *Agushi*, 196 F.3d at 761; *Stevens*, 935 F.2d at 1404-1405; *Cohen*, 888 F.2d at 776; *Aboumoussallem*, 726 F.2d at 912. Those cases are fully consistent with the approach the lower courts took in this case. The district court noted that the evidence petitioner sought to introduce would not have been admissible under Rule 404(b) because it was intended to show propensity, Pet. App. 40, 44-45, but excluded the evidence under Rule 403 based on its conclusion that any slight probative value of the evidence would have been overly prejudicial and confusing to the jury, *id.* at 45-46. The court of appeals held that the

district court had not abused its discretion in so ruling. *Id.* at 1-2.

The courts' conclusion that a criminal defendant may not introduce evidence of a third party's prior acts in order to prove the bad character of that person or that person's propensity to engage in illegal activity is consistent with Rule 404(b). The Rule prohibits the introduction of "[e]vidence of other crimes, wrongs, or acts * * * to prove the character of *a person* in order to show action in conformity therewith." Fed. R. Evid. 404(b) (emphasis added). The prohibition applies to evidence regarding any "person['s]" prior acts and character; it is not limited to a defendant's prior acts or character. See *Lucas*, 357 F.3d at 605; *Agushi*, 196 F.3d at 760.

In any case, even if this Court were to conclude that a defendant is entitled under Rule 404(b) to introduce evidence of a third party's prior acts in order to prove the bad character of that person, such a ruling would have no effect on petitioner's case. Neither the district court nor the court of appeals based its ruling on the inadmissibility of the proffered evidence under Rule 404(b). Both courts relied on the conclusion that the evidence would be impermissibly prejudicial and confusing under Rule 403, which affords trial courts discretion to exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The court of appeals was correct that the district court did not abuse its discretion in excluding the evidence under Rule 403. Petitioner sought to introduce evidence that Maad had stolen from his former father-

in-law and from a former employer more than two decades ago in order to show that petitioner lacked criminal intent because Maad had tricked him into aiding and abetting his fraudulent scheme. But none of the evidence petitioner sought to introduce involved Maad's tricking an innocent person into assisting him with a criminal scheme. That lack of a factual nexus, combined with the temporal remoteness of the evidence, renders its relevance questionable at best. There was, moreover, already sufficient evidence before the jury of Maad's untrustworthy nature. The evidence showed, for example, that Maad might have been involved in the vandalism of his own printing shop; that he had been convicted of lying on a loan application; that he had a reputation for being dishonest and a con artist; and that, according to his own daughter, he had throughout her life been known to gain the trust of people and then to destroy it. See Gov't C.A. Br. 25-28. In light of this evidence of Maad's more recent deceitful conduct and reputation, the evidence of the 25-year-old thefts, to the degree it had any probative value at all, would have been cumulative.

The district court correctly concluded that the admission of such evidence would have posed precisely the dangers enumerated in Rule 403 by distracting the jury from the essential factual issues about petitioner's conduct and mental state and by unduly prolonging the proceedings. See Pet. App. 46. The district court acted well within its discretion in determining that these risks vastly outweighed whatever probative value the evidence may have had, and the court of appeals correctly

affirmed the district court's ruling on that basis. *Id.* at 1-2.[4]

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court should hold the petition pending its resolution of issues related to honest-services fraud in *Black* v. *United States*, No. 08-876; *Weyhrauch* v. *United States*, No. 08-1196; and *Skilling* v. *United States*, No. 08-1394, and then dispose of the petition accordingly.

Respectfully submitted.

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MAY 2010

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[4] In upholding the district court's Rule 403 determination, the court of appeals concluded that the evidence in question had a "tendency towards unfair prejudice and confusion of the issues." Pet. App. 2. Petitioner challenges the court's reliance on the unfair-prejudice factor on the ground that the other-crime evidence did not prejudice *him*. Pet. 21. But the Advisory Committee Notes make clear that the Rule was intended to be party neutral, defining "unfair prejudice" as a "tendency to suggest decision on an improper basis." Fed. R. Evid. 403, 1972 Advisory Comm. Note. In this case, the admission of the other-crime evidence threatened to unfairly prejudice the government by confusing the jury with collateral issues that had no substantial bearing on the question of petitioner's guilt.

Supreme Court, U.S.
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No. 09-1035

In The
Supreme Court of the United States

IMAD SALIM HEREIMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Petitioner was convicted of aiding and abetting a violation of *18 U.S.C. § 1341* under a failure to disclose theory, after he was denied the use of evidence that would have shown he was a victim of deception on the part of Nezar Khaled "Mike" Maad. A conviction for aiding and abetting a violation of *18 U.S.C. § 1341*, under a failure to disclose theory, required proof that petitioner had knowledge of Maad's duty and failure to disclose. The deliberate ignorance instruction given to the jury allowed the jury to find knowledge based on a "high probability" that facts supporting the knowledge element of the offense were true. Denying the right to admit evidence supporting an affirmative defense and allowing the jury to decide important facts going toward establishing an element of the offense based on a substantial or high probability that the fact is true both raise serious constitutional questions.

I. The Government likely misunderstood the questions presented in the Petition.

The Government either attempts to recharacterize or it misunderstood the questions presented by Petitioner. (GB 6). Petitioner does not argue that the district court "abused its discretion" when it instructed the jury about deliberate ignorance and when it denied Petitioner's request to introduce evidence supporting his affirmative defense. *Id.* Nor does Petitioner argue that the district court erred in

giving the deliberate ignorance instruction solely because it did not include a motive element. (GB 6). Petitioner argues that the deliberate ignorance instruction lessened the burden of proof and denies Petitioner his constitutional right to be convicted by proof beyond a reasonable doubt. (Pet. 13-22). Regarding admission of evidence, Petitioner argues that precluding the admission of Rule 404(b) evidence, that is relevant to an affirmative defense, implicates the due process rights of a criminal defendant because he is denied the right to a complete defense. (Pet. 22).

II. The deliberate ignorance instruction unconstitutionally allows the jury to find facts relevant to the intent or knowledge element of an offense by "substantial probability" instead of proof beyond a reasonable doubt.

Petitioner objected to the deliberate ignorance instruction, in part, because it lessened the burden of proof required for a conviction. (Pet. App. 49-53; 54-64). In his argument before the Court of Appeals, Petitioner clearly argued that the deliberate ignorance instruction allowed the jury to convict under the wrong standard by finding facts based on a substantial probability that the fact was true rather than on proof beyond a reasonable doubt. (Ninth Circuit, Brief of Appellant at 22-25 and Reply Brief at 8-10). "Substantial probability," as a burden of proof, lies somewhere between preponderance of the evidence

and clear and convincing evidence. Substantial probability has been defined as "much more likely than not." *State v. Nelson (In re Nelson)*, 727 N.W.2d 364, 367 (Wis. Ct. App. 2006).[1]

This Court has held, the Fifth and Sixth Amendments to the U.S. Constitution require criminal convictions to rest upon a jury determination that the defendant is guilty, beyond a reasonable doubt, of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993). The prosecution bears the burden of proving all elements of the offense charged, *see, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977); and the prosecution must persuade the fact finder of the facts necessary to establish each of those elements, *see, e.g., In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam). Each fact must be proven "beyond a reasonable doubt." *Id.*

Synthesizing this Court's prior decisions, it is clear that every fact supporting a conviction must be proven beyond a reasonable doubt and it would violate the constitutional principles laid down by this Court to allow an important element of an offense to be established based on a substantial/high probability

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[1] Petitioner has not waived this argument. (GB 7). Petitioner clearly presented this argument to district court (Pet. App. 54-64); and the Court of Appeals (Ninth Circuit Docket No. 10). The Court of Appeals was bound by its prior decisions and it failed to even address the question whether the instruction in this case lessened the burden of proof. (Pet. App. 1-3).

that necessary facts are true. (Pet. App. 52-53). In the instant case, Instruction No. 6, which the district court intended as an alternative to Instruction No. 3 (Pet. App. 56); allowed the jury to determine Petitioner's knowledge, not based on actual knowledge that Mike Maad had a duty to disclose and in fact failed to disclose a conflict of interest; but based on the fact that Petitioner was aware of a "high probability" that Mike Maad had failed to disclose his conflict of interest to his employer. (Pet. App. 52-53).

Instruction No. 3 told the jury that in order to convict Petitioner of aiding and abetting honest services fraud, the jury had to conclude that Mike Maad had a legal duty to disclose his involvement with Petitioner's business interests and that Mike Maad failed to disclose that involvement. (Pet. App. 50). Instruction No. 3 further informed the jury it had to find "beyond a reasonable doubt" that Mike Maad committed honest services fraud by mail and that Petitioner knowingly and intentionally aided and counseled Mike Maad to commit the crime of honest services fraud by mail. (Pet. App. 52).

While Instruction No. 3 may have adequately stated the burden of proof, the alternative instruction, Instruction No. 6, allowed the jury to determine knowledge and intent based on a "high probability" that Mike Maad had committed honest services fraud by mail, that Petitioner was aware of this "high probability," and that Petitioner deliberately avoided learning the truth. *Id.* The alternative Instruction allowed Petitioner to be convicted of aiding and

abetting a crime even if Mike Maad was not guilty of a crime. *Id.* Instruction No. 6 clearly changed the burden of proof and the elements of the crime. *Id.* Instruction No. 3 required the jury find beyond a reasonable doubt that Mike Maad committed a crime and Petitioner knowingly and intentionally aided and abetted in the commission of that crime. Instruction No. 6 allowed the jury to convict the Petitioner if there was merely a "high probability" that Mike Maad was guilty of a crime and there was a high probability that Petitioner was aware of Mike Maad's failure to disclose. (Pet. App. 52-53).

The Fifth Amendment Due Process Rights and Sixth Amendment guarantees of notice and jury trial indisputably entitle a criminal defendant to: "A Jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

A significant and important question is raised in this case warranting discretionary review by this Court: whether the deliberate ignorance instruction, as an alternative to the knowledge and crime occurrence elements of the offense of aiding and abetting, violates Petitioner's right to be convicted by proof beyond a reasonable doubt. (Pet. 13-16). The fact that

most jurisdictions have some version of the deliberate ignorance instruction and that deliberate ignorance instructions are used in a variety of crimes, shows that the question presented is an important one because it would be reasonable to suspect that hundreds of convictions are entered based on the wrong standard of proof. *See, e.g., United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (deliberate ignorance instruction used in prosecution for drug offenses).

In one of the first cases authorizing a deliberate ignorance instruction, the instruction required proof beyond a reasonable doubt that the defendant was deliberately ignorant. *See Spurr v. United States*, 174 U.S. 728, 738 (1899). After this Court's decision in *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969), which discussed the definition of knowledge but did not specifically approve of a deliberate ignorance instruction, the Court of Appeals for the Ninth Circuit entered its decision in *United States v. Jewell*, 532 F.2d 697, 703 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). Over the next thirty-five years, the instruction has been transformed through judicial decision into instructions that allow negligence to be substituted for proof beyond a reasonable doubt.

Clearly, the prosecution must show knowledge of the material elements of the offense, rather than mere recognition of some wrongdoing. *See, e.g.*, *United States v. Morales*, 577 F.2d 769, 773 (2d Cir. 1978) (stating that, to convict for knowing importation, "the Government had to show that appellant knew she possessed drugs, not that she was aware

that she might be involved in some sort of criminal activity"); *see also United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325-1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part) (stating that, in deliberate-ignorance cases, "the evidence [must] sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged"). The deliberate ignorance instruction, if allowed at all, should not be allowed unless the evidence can sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged. *Id.* The danger in allowing instructions, like the one at issue in the instant case, is that juries will avoid questions of scienter and convict under the standards analogous to negligence. *Id.* Such convictions are wholly inconsistent with the requirement that an individual be convicted by proof beyond a reasonable doubt. *See id.*, 552 F.2d at 1325-1326 (Kennedy, J., concurring in part and dissenting in part). Important constitutional issues are presented in the Petition and the question clearly has national implications.

III. There is a significant question whether Evidence Rule 404(b) should be strictly applied to prevent evidence supporting an affirmative defense in a criminal proceeding.

In presenting its evidence at trial, the Government opened the door to the admission of Rule 404(b) evidence by admitting testimony concerning Mike Maad's criminal history and his prior conduct. (Tr. Vol. III at 105). This evidence centered on Maad, his prior bad acts, and the reason that he was on Federal Probation for prior crimes. (Tr. Vol. III 105-126). When Petitioner sought to introduce additional evidence of Mike Maad's prior conduct, that was relevant to Petitioner's defense that he had been duped, the district court clearly stated the proffered evidence tended to prove propensity, which is precluded by 404(b). (App. 46-47).

There is clearly a conflict between the Circuit Courts of Appeals regarding the application of Rule 404(b) preclusive effect when a criminal defendant seeks to admit evidence tending to prove a defense. (Pet. 17-21). The question whether Rule 404(b) should preclude the admission of bad acts evidence that is relevant to a defense is a question of constitutional import. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

The question is whether exclusion of evidence because it tends to show propensity is reasonable when the defense seeks to admit the evidence and

there is no prejudice to the prosecution. *See United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005) (finding a Confrontation Clause violation when defendant, who argued that he did not know the truck in which he was riding was filled with marijuana, was not permitted to cross-examine the owner of the truck about a previous incident involving marijuana hidden in a truck), *United States v. Aboumoussallem*, 726 F.2d 906, 911-913 (2d Cir. 1984) (finding reverse 404(b) evidence that third party may have been "duped" by coconspirator into transporting narcotics unknowingly was relevant to show that the defendant was also duped into transporting narcotics unknowingly), and *United States v. McClure*, 546 F.2d 670, 672-673 (5th Cir. 1977) (finding that "evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced").

Contrary to the Government's position (GB 11-13), there is a conflict between the Circuits as to the standard to be applied when the defense seeks to introduce Rule 404(b) evidence and the district court did exclude the evidence because it tended to show propensity. (Pet. App. 39-40). Because Mike Maad had fled the country and was not available to testify and had not previously testified, Petitioner should have been allowed to proffer Rule 404(b) evidence to support his defense. The question is, should there be a different standard applied when the defense seeks to

introduce Rule 404(b) evidence and there is no prejudice to the prosecution.

CONCLUSION

Petitioner agrees that he may be entitled to relief from his conviction depending upon the Court's decisions in *Skilling v. United States*, No. 08-1394 and *Weyhrauch v. United States*, No. 08-1196 and should the Court decide not to grant his petition on the questions presented, his case should be held in abeyance until those cases are decided. *Skilling* challenges *18 U.S.C. § 1346* as being void for vagueness and that issue is also raised in *Weyhrauch*. If the statute is void as to *Skilling* and *Weyhrauch* it would be void as to Petitioner. However, Petitioner prays for an order granting his petition because there are questions raised in Petitioner's case that are of national import and which are not raised in *Skilling* or *Weyhrauch* and which are far reaching in that the questions presented apply to prosecutions for offenses other than honest services fraud.

Respectfully submitted,

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